United States Court of Appeals

for the Second Circuit

APPENDIX

74-2499

ORIGINAL

B

P/S

United States Court of Appeals

For the Second Circuit

WINSTON E. KOCK, JR.,
Plaintiff-Appellee,

against

THE BRUNSWICK CORPORATION,
Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

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JOINT APPENDIX

VOLUME I OF TWO VOLUMES
(Pages 1A to 230A)

BLUMBERG, SINGER, ROSS,
GOTTESMAN & GORDON
Attorneys for Defendant-Appellant
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New York, New York 10017
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New York, New York 10005
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UNITED STATES COURT OF APPEALS
FILED
JAN 27 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

4

PAGINATION AS IN ORIGINAL COPY

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TESTIMONY

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PLAINTIFF'S EXHIBITS

14—Contract Dated November 17, 1972 Between Kock and N.W. Ayer, Inc. 454A

15—Proposed Contract Prepared by Kock Dated October 12, 1972 and Letter Dated November 27, 1972 from Brunswick to Kock 457A

78—Letter Dated December 1, 1972 from Rumrill Hoyt, Inc. to Kock 462A

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RELEVANT DOCKET ENTRIES

May 2, 1973	Complaint Filed
January 24, 1974	Supplemental Answer of defendant Brunswick Corporation - Filed.
January 31, 1974	Plaintiff's Reply to Counterclaims of defendant Brunswick Corporation in its Supplemental Answer - Filed.
October 18, 1974	Filed Judgment #74,821 - Ordered that Plaintiff Winston E, Kock, Jr. have judgment against the defendant Brunswick Corporation in the amount of $79,464.78 and that defendant's counterclaim is dismissed.

RELEVANT DOCUMENTS NOT DOCKETED

Plaintiff's Amended Requests To Charge

Defendant's Requests To Charge

Transcript of Trial

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

WINSTON E. KOCK, JR.,

Plaintiff,

- against -

THE BRUNSWICK CORPORATION and WALT PEABODY ADVERTISING SERVICE, INC.,

Defendants.

COMPLAINT

73 Civ. 1941

TENNEY, J.

Plaintiff, by his attorneys, Messrs. Brashich and Finley and Burke & Burke, complaining of the defendants, respectfully alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION
AGAINST DEFENDANT BRUNSWICK

1. Plaintiff at all times hereinafter mentioned is and was a resident of the State of New York, conducting business within the jurisdiction of this Court, either solely in his own name or under the assumed business name of Winston E. Kock Associates.

2. Defendant The Brunswick Corporation (hereinafter "Brunswick"), upon information and belief, at all times hereinafter mentioned, is a corporation duly organized, created and existing pursuant to the laws of the State of Delaware, having its principal office and place of business in the State of Illinois. Upon information and belief, Brunswick in accordance with the provisions of Article 13 of the Business Corporation Law has duly presented the Secretary

of State of the State of New York the necessary statement and designation with a copy of its Certificate of Incorporation, duly certified, and procured from the said Secretary of State a Certificate of Authority, stating among other things that Brunswick is authorized to do business in the State of New York.

3. Defendant Brunswick at all times hereinafter mentioned, maintains offices and transacts substantial business within the State of New York, and more specifically within the jurisdiction of this Court.

4. Defendant Walt Peabody Advertising Service, Inc. (hereinafter "Peabody"), upon information and belief, is a corporation duly organized, created and existing pursuant to the laws of the State of Florida. Upon information and belief Peabody, in accordance with the provisions of Article 13 of the Business Corporation Law, has duly presented the Secretary of State of the State of New York the necessary statement and designation with a copy of its Certificate of Incorporation duly certified, and procured from the said Secretary of State a Certificate of Authority, stating among other things that Peabody is authorized to do business in the State of New York.

5. Defendant Peabody, upon information and belief, transacts substantial business within the State of New York, and more specifically within the jurisdiction of this Court.

6. Jurisdiction of this Court is invoked in accordance with Title 28, Section 1332 of the United States Code in that the matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.) exclusive of interest and costs and is between citizens of different states.

7. On or about November 27, 1972, plaintiff and defendant Brunswick entered into an agreement, both orally and in writing, wherein it was agreed by and between the parties thereto that plaintiff would have the sole and exclusive right to sell national advertising to be printed on all bowling score sheets to be used on and after March 1, 1973 at the approximately 200 bowling alley centers owned and/or operated by Brunswick; that plaintiff was to supply Brunswick with approximately four and one-half million such sheets per year at plaintiff's sole cost and expense and that Brunswick would cause them to be used exclusively at said bowling centers and thus carry the advertisers' commercial messages displayed thereon to members of the bowling public.

8. Relying on said agreement as set forth above, plaintiff solicited and contracted with various persons, firms and corporations for advertising to be placed on said score sheets, designed, procured and paid for the production and printing of several million thereof and accepted fees from said advertisers therefor in return for plaintiff's

commitment to said advertisers for the use and distribution of said score sheets by Brunswick as above set forth, all with the full knowledge and consent of Brunswick, whose officers, agents and employees cooperated with and assisted plaintiff in said efforts.

9. Plaintiff has performed all of the terms and conditions of said agreement on his part to be performed and has delivered to Brunswick, in accordance with the terms thereof, approximately 2.4 million bowling score sheets each containing advertising so contracted for and procured by plaintiff.

10. Defendant Brunswick, in violation of the terms and conditions of said agreement, has intentionally, wilfully and wrongfully failed, refused and continues so to refuse to place, use, consume, exhibit and otherwise distribute said bowling score sheets to the general bowling public at Brunswick's approximately two hundred (200) bowling facilities throughout the various states of the United States.

11. By reason of the premises, plaintiff has been damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.).

AS AND FOR A SECOND CAUSE OF ACTION
AGAINST DEFENDANT BRUNSWICK

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10 inclusive

hereof as if again more fully set forth herein.

13. Plaintiff, in reliance on said agreement with Brunswick (referred to above in paragraph 7 hereof), duly entered into separate agreements with numerous other third parties for a specific number of advertising exposures, to wit, 2.4 million, at the approximately two hundred (200) bowling facilities owned and/or operated by Brunswick in the various states of the United States.

14. Plaintiff, in further reliance on said agreement with Brunswick, duly entered into separate agreements with numerous other third parties for the production of additional score sheets for the term of said agreement with Brunswick.

15. Solely by reason of Brunswick's intentional, wilful and wrongful breach of its agreement as aforesaid, plaintiff, through no fault of his own, has been prevented from performing his said agreements with advertisers and others and thereby may be rendered liable to said third parties in damages or otherwise for breach thereof in an amount and on terms presently unascertained but for which liability, when fixed and ascertained by suit or settlement, together with all costs and expenses connected therewith, defendant Brunswick will be liable to indemnify plaintiff.

AS AND FOR A THIRD CAUSE OF ACTION
AGAINST DEFENDANT PEABODY

16. Plaintiff repeats and reallages each and every allegation contained in paragraphs 1 through 10 and

13 through 15 hereof, both inclusive, as if again fully set forth herein.

17. Upon information and belief, Peabody, with full knowledge of plaintiff's said agreement with Brunswick, with the intent to injure, destroy and otherwise damage and interfere with plaintiff's business and professional reputation, did wrongfully, fraudulently, knowingly, intentionally and maliciously persuade, induce and procure Brunswick to repudiate and breach the agreement alleged in paragraph 7 hereof, and Brunswick would not have repudiated and breached said agreement but for the wrongful and malicious conduct of Peabody.

18. By reason of the premises plaintiff has been damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.).

AS AND FOR A FOURTH CAUSE OF ACTION
AGAINST BOTH DEFENDANTS

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10 and 13 through 15, both inclusive, and paragraph 17 hereof as if again fully set forth herein.

20. As a result of the deliberate, intentional, wilful, malicious and wrongful acts and conduct of defendants complained of herein, plaintiff's general advertising agency business and his professional reputation among present and potential future advertiser-clients has been and will continue to be severely impaired and injured to his great loss and damage.

21. By reason of the premises plaintiff has been damaged in the sum of One Million Dollars ($1,000,000.)

WHEREFORE, plaintiff prays for judgment as follows:

AS AGAINST DEFENDANT BRUNSWICK: judgment for indemnification against any and all losses sustained or to be sustained by reason of plaintiff's inability to perform his agreements with third parties due to defendant's prevention of such performance and for damages in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.), together with punitive and exemplary damages in the sum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000.) for the wilful breach by said defendant of its agreement with plaintiff, together with plaintiff's costs and disbursements and interest as provided by law.

AS AGAINST DEFENDANT PEABODY: judgment for damages in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.), together with punitive and exemplary damages in the sum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000.) for wilfully inducing breach of contract by defendant Brunswick, together with plaintiff's costs and disbursements and interest as provided by law.

AS AGAINST BOTH DEFENDANTS: judgment for damages in the sum of One Million Dollars ($1,000,000.), together with punitive and exemplary damages in the sum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000.) for wilful

and malicious injury to plaintiff's business and reputation, together with plaintiff's costs and disbursements and interest as provided by law and for such other and further relief as this Court may deem appropriate.

Dated: New York, New York
May 1, 1973

BRASHICH AND FINZEY

By _____
Deyan Banko Brashich
A Member of the Firm
Attorneys for Plaintiff
20 East 46th Street
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Tel. (212) 684-1730

BURKE & BURKE

By _____
William O'C. Harnisch
A Member of the Firm
Attorneys for Plaintiff
One Wall Street
New York, N.Y. 10005
Tel. (212) 344-5100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

WINSTON E. KOCK, JR.,

Plaintiff,

-against-

THE BRUNSWICK CORPORATION and WALT PEABODY ADVERTISING SERVICE, INC.,

Defendant

: 73 Civ. 1947 M.E.F.

SUPPLEMENTAL ANSWER

- -x

Defendant Brunswick Corporation (hereinafter "Brunswick"), by its attorneys BLUMBERG, SINGER, ROSS, GOTTESMAN & GORDON, in answer to the complaint, alleges:

AS TO THE FIRST CAUSE OF ACTION

FIRST: Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs 1, 4, 5 and 6.

SECOND: Denies the allegations contained in Paragraphs 10 and 11.

THIRD: Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 7, except admits that on or about November 27, 1972 plaintiff and defendant Brunswick entered into an agreement in writing consisting of the documents dated respectively October 12, 1972 and November 27, 1972, copies of which are annexed hereto and made part hereof, as Exhibits A-1 and A-2.

FOURTH: Denies the allegations contained in Paragraph 8, except denies knowledge or information sufficient to form a belief as to the truth or falsity of so much of such allegations as relate to plaintiff's alleged solicitations and contracts with various persons, firms and corporations, the designing, procuring and paying for production and printing of score sheets by plaintiff, and acceptance by plaintiff of fees from advertisers.

FIFTH: Denies the allegations contained in Paragraph 9 and specifies that:

(a) Plastic score sheets supplied by plaintiff for use in telescores are defective and not suitable for use as score sheets in defendant Brunswick's bowling establishments, in that the score sheet imprint thereon is subject to wearing off after a short period of normal usage;

(b) A substantial quantity of the score sheets supplied by plaintiff are defective and not suitable for use as score sheets in that they are not consecutively numbered;

(c) Plaintiff failed to deliver score sheets to certain of defendant Brunswick's bowling establishments;

(d) Plaintiff failed to deliver score sheets to defendant Brunswick's bowling establishments within the time specified for such delivery;

(e) Plaintiff failed to make delivery of score sheets to bowling centers in the manner agreed upon.

AS TO THE SECOND CAUSE OF ACTION

SIXTH: Repeats and realleges each and every answer to each and every allegation contained in Paragraphs 1 through 10, inclusive, as such allegations are realleged in Paragraph 12.

SEVENTH: Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs 13 and 14.

EIGHT: Denies the allegations contained in Paragraph 15.

AS TO THE THIRD CAUSE OF ACTION

NINTH: Repeats and realleges each and every answer to each and every allegation contained in Paragraphs 1 through 10, inclusive and 13 through 15, inclusive, as said paragraphs are realleged in Paragraph 16.

TENTH: Denies so much of the allegations of Paragraphs 17 and 18 as may be intended to allege that defendant Brunswick repudiated and breached its agreement with plaintiff, and denies knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation contained in said Paragraphs 17 and 18.

AS TO THE FOURTH CAUSE OF ACTION

ELEVENTH: Repeats and realleges each and every answer to each and every allegation contained in Paragraphs 1 through 10, inclusive, 13 through 15, inclusive, and 17, as said paragraphs are realleged in Paragraph 19.

TWELFTH: Denies the allegations contained in Paragraphs 20 and 21.

FOR A COMPLETE AFFIRMATIVE DEFENSE

THIRTEENTH: The complaint fails to state a claim against defendant Brunswick upon which relief may be granted.

AS AND FOR A FIRST SEPARATE AND DISTINCT COUNTERCLAIM

FOURTEENTH: On or about November 27, 1972, plaintiff and defendant Brunswick entered into a certain agreement in writing, consisting of the documents dated respectively October 12, 1972 and November 27, 1972, copies of which are annexed hereto and made part hereof as Exhibits A-1 and A-2.

FIFTEENTH: Defendant Brunswick has duly performed all of the terms and conditions of said agreement on its part to be performed.

SIXTEENTH: Plaintiff breached said agreement in that:

(a) Plastic score sheets supplied by plaintiff for use in telescores are defective and not suitable for use as score sheets in defendant Brunswick's bowling establishments, in that the score sheet imprint thereon is subject to wearing off after a short period of normal usage;

(b) A substantial quantity of the score sheets supplied by plaintiff are defective and not suitable for use as score sheets in that they are not consecutively numbered;

(c) Plaintiff failed to deliver score sheets to certain of defendant Brunswick's bowling establishments;

(d) Plaintiff failed to deliver score sheets to defendant Brunswick's bowling establishments within the time specified for such delivery;

(e) Plaintiff failed to make delivery of score sheets to bowling centers in the manner agreed upon.

SEVENTEENTH: By reason of the foregoing, defendant Brunswick has incurred and will in the future incur substantial damages, the exact amount of which it cannot at the present time determine but which it estimates are at least in the amount of $25,000.

AS AND FOR A SECOND SEPARATE AND DISTINCT COUNTERCLAIM

EIGHTEENTH: Repeats and realleges each and every allegation set forth in Paragraphs 14 and 15 hereof.

NINETEENTH: Plaintiff breached said agreement in that he made only partial delivery of the quantity of score sheets which he had agreed to deliver and has failed and refused to deliver the balance thereof as required by the terms of the said agreement.

TWENTIETH: By reason of the foregoing, Brunswick has incurred and will in the future incur substantial damages, the exact amount of which cannot at the present time be determined, but which it estimates are at least in the amount of $75,000.

WHEREFORE, defendant Brunswick Corporation demands judgment as follows:

(a) Dismissing the complaint as against it;

(b) On its first counterclaim in the sum of at least $25,000;

(c) On its second counterclaim in the sum of at least $75,000;

(d) For the costs and disbursements of this action.

Dated: New York, New York
January 22, 1974

BLUMBERG, SINGER, ROSS, GOTTESMAN & GORDON

By _____
A Member of the Firm

Attorneys for Defendant, Brunswick Corporation
245 Park Avenue
New York, New York 10017
(212) 682-7700

WINSTON E. KOCK JR. 16A
220 East 73rd Street New York City, N.Y. 10021 (212) 988-1478

October 12, 1972

AGREEMENT BETWEEN:
WINSTON E. KOCK JR. and BRUNSWICK CORPORATION
(Revises June 8, 1972 Agreement)

This will confirm and expand our several conversations, meetings, correspondence, and Agreement of June 8, 1972 regarding my furnishing you with certain bowling score sheets for the approximately 200 bowling centers owned and operated by you. (see attachments)

I will supply you with 4.5 million open color bowling score sheets, and will increase the number of plastic sheets for league bowling from 30,000 originally agreed upon to 60,000. This supply will be for a period commencing March 1973 thru March 1974 and will be deemed automatically extended for an additional year or years unless terminated by either party.

It is understood that both you and I will have the right to terminate the same by giving notice ninety (90) days prior to the expiration of our agreement or any renewal.

It is further agreed that I may make delivery of the four million five hundred thousand (4,500,000) color open score sheets and the sixty thousand (60,000) league plastic sheets, at my option, on an annual basis, a semi-annual basis, or a quarterly basis, said delivery time being proportionate to the respective time period covered.

continued . . .

I further re-iterate that it is imperative that these score sheets receive full and fair exposure, and that you therefore will use the same in bowling centers owned and operated by you exclusively for the period of this agreement.

You have brought to my attention that you desire that advertising carried on such score sheets will not carry any advertising for fast food services, nor exhibit any competitive bowling equipment, and I agree to be bound by your restrictions.

I also confirm that I will consult you for your approval with regard to any merchandising assistance that I may seek, and that your approval must be obtained. (Examples: we talked about a candy advertiser must be a name brand to be carried in the machine, likewise a cigarette would be carried, a cigar carried where cigars are sold, etc.)

It is also understood that you will provide me with accurate shipping instructions and quantities for each and every bowling center owned and operated by you at your earliest convenience so that delivery may be effected for March 1973.

It is understood that I shall provide and pay for shipping charges incurred in the distribution of these bowling sheets by me, and I further agree to place at your disposal in your district office centers a supply of additional sheets for use not anticipated by this contract and quantities specified by you for your centers.

Additional points raised in our conversations and writings since our initial agreement are hereby added to that agreement and clarified as follows:

A. That you have a single supplier of soft drinks. That supplier is Coca-Cola, and I agree not to carry any advertisements for any other soft drink soda company. (Example: No Pepsi-Cola, No Royal Crown, etc.)

continued . . .

B. That "Welcome to Brunswick" or a slug line similar, shall be printed directly under the Winston Kock Associates on the score sheets.

C. That quantities for each bowling center shall be quoted by you on the basis of annual use, semi-annual use, and quarterly use.

That since league telescore sheets are of two sizes, you shall indicate which centers get which sizes along with the quantities needed.

That I will supply league paper sheets to those centers where telescores are not in use, and that you will likewise indicate which centers these are and what quantities of league paper sheets they require.

That each individual center shall mail to me at least one sample of the score sheet they were using, so that I may show advertisers what my new color sheet has replaced.

D. That additional advertising/marketing testing similar to the original market test may be conducted by myself at my expense in any of the bowling centers. Such testing is subject to your approval with details to be agreed upon before such testing is done.

E. It is specifically understood that any and all advertiser shall be subject to your prior written approval. Immediately upon your acceptance of this agreement a list thereof shall be made available to you for your said approval.

Yours sincerely,

Winston E. Kock Jr.

WEK:drb

Agreed to and accepted: BRUNSWICK CORPORATION

By_____

19 A

November 27, 1972

Mr. Winston E. Kock, Jr.
220 E. 73rd Street
New York, N.Y. 10021

Dear Mr. Kock:

Subject: Score Sheet Agreement

This is to confirm our intention to enter into an agreement with you for you to supply, exclusively, score sheets and plastic sheets upon a basis substantially as set forth in the attached proposed letter agreement dated October 12, 1972.

As we explained to you, Brunswick may have certain commitments to Walt Peabody Advertising Service. Brunswick intends to live up to any legally binding obligation to Peabody, but we will take every legally permissible step to phase them out at the earliest practicable time.

You have agreed to hold open the proposal outlined in that letter of October 12 until Brunswick can clarify its legal position with Peabody.

Very truly yours

BRUNSWICK CORPORATION

By _____
William Kratzenberg
National Merchandise Manager

W:s/a

Exhibit A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WINSTON E. KOCK, JR.,

Plaintiff,

-against-

THE BRUNSWICK CORPORATION and WALT PEABODY ADVERTISING SERVICES, INC.,

Defendants.

----------x

73 CIV 1945 - N.E.F.

REPLY

PLAINTIFF, WINSTON E. KOCK, JR., by his attorneys BRASHICH AND FINLEY, in reply to the counterclaims contained in defendant BRUNSWICK CORPORATION's supplemental Answer, respectfully alleges as follows:

1. Admits the allegation contained in paragraph "Fourteenth" of defendant BRUNSWICK's Answer and Counterclaim, except denies that such allegations contain the totality of such agreement and begs leave to refer at trial as to subsequent writings and oral conversations and acts of defendant BRUNSWICK modifying and affirming said agreement.

2. Denies each and every allegation contained in paragraphs "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", and "Twentieth" of defendant BRUNSWICK's Answer and Counterclaim.

ASHICH AND FINLEY
EAST 46TH STREET
W YORK, N.Y. 10017
(212) MU 4-1780

WHEREFORE, plaintiff prays for judgment dismissing the counterclaim and for the relief sought in the Complaint heretofore served and filed.

DATED: New York, New York
January 29, 1974.

Yours, etc.,

BRASHICH AND FINLEY

By: DEYAN RANKO BRASHICH
Attorneys for Plaintiff
20 East 46 Street
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TO: BURKE & BURKE, ESQUIRES
Attorneys for Plaintiff
One Wall Street
New York, New York 10005

J. STANLEY SHAW, ESQUIRE
Attorney for Defendant WALT PEABODY ADVERTISING SERVICES, INC.
770 Lexington Avenue
New York, New York 10022

BLUMBERG, SINGER, ROSS, GOTTESMAN & GORDON
Attorneys for Defendant BRUNSWICK CORPORATION
245 Park Avenue
New York, New York 10017

RASHICH AND FINLEY
20 EAST 46TH STREET
NEW YORK, N.Y. 10017
(212) MU 4-1730

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

WINSTON E KOCK, JR.,

Plaintiff,

-against-

THE BRUNSWICK CORPORATION,

Defendant.

----------X

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M.E.F.

PLAINTIFF'S AMENDED REQUESTS TO CHARGE

Plaintiff requests that the following charges be given to the jury upon both sides resting by the HONORABLE MARVIN E. FRANKEL, to whom this cause has been assigned for all purposes:

1. If you find that the contract and agreement between the parties comprised of the telegram dated August 10, 1972 (PLAINTIFF'S EXHIBIT 56) and plaintiff's letter dated August 12, 1972 (PLAINTIFF'S EXHIBIT 55) and the letters dated October 12, 1972 (PLAINTIFF'S EXHIBIT 13) and November 27, 1972 (PLAINTIFF'S EXHIBIT 16), and oral statements and assurances made to plaintiff by agents and servants of the defendant on August 10, 1972, November 27, 1972, and January, 1973,

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YORK, N.Y. 10017
(212) MU 4-1730

then you must find for the plaintiff.

2. I charge you that an agreement between the parties which is enforcable may be either in writing or oral, or it may be comprised of both.

3. If you find that the contract and agreement between the parties comprised of such correspondance and writings starting August 10, 1974, I then charge you that in fact the parties did have a binding and enforcable agreement as of the receipt of the telegram of August 10, 1974 by the defendant.

4.If you find that there was in fact an agreement between the plaintiff and the defendant whereby the defendant BRUNSWICK agreed to commence using exclusively in all two hundred bowling centers the plaintiff's score sheets during the month of March, 1973, and if you find that defendant BRUNSWICK'S action to be such as would constitute a breach of this agreement, then you must find for the plaintiff and must find that any subsequent acts required of the plaintiff under the agreement are excused as a matter of law.

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YORK, N.Y. 10017
212) MU 4-1730

5. I charge you that if you find that defendant BRUNSWICK had in fact breached its agreement with the plaintiff, then plaintiff's obligation to furnish the defendant with additional score sheets and additional plastic score sheets for the balance (six months) of the agreement was extinguished.

6. If you find, on the other hand, that plaintiff had to perform under the contract and provide BRUNSWICK with make good score sheets in plastic, then you must offset and award to the plaintiff by the sum of $4,000.00, the value of the plastic score sheets as you had heard Mr. Bersh the gentlemen from LASKY AND COMPANY testify.

7. I charge you that plaintiff's obligation under the contract to supply and deliver bowling score sheets in a sequentially numbered order from pad to pad and carton to carton was and is not a substantial and essential condition or obligation under the contract, and I further charge you that the dissemination of the scoring sheets by defendant's agents, servants and employees from central receiving points, to which the defendant agreed to, may be considered as an acquiescence

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to the lack of such sequential numbering.

8. If you find for the plaintiff, then I charge you that as a matter of law, you may award not damages on any concept of what the plaintiff would have made in profits from this venture, since our law as it now exists does not allow for recovery of such speculative damages.

9. If you find for the plaintiff, then I charge you that he is, however under our law, entitled to any and all damages which he has sustained, and such damages are not to be limited solely to the sum which plaintiff expended in the production of the bowling score sheets, but are to entail any costs and disbursements which he made in connection with the soliciting of potential advertisers, establishing his enterprise and any other costs and disbursements which he made in reliance of the agreement commencing August 10, 1972 and terminating on May 2, 1973, when he commenced this suit against the defendant. I charge you further that as an additional measure of damages you may consider his loss of reputation, his loss of opportunity and the actual time he expended in this venture and his ability and worth and you may consider his immediately

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prior salary to going into business for himself which you had heard he testified to be $22,000.00 per year in 1971.

10. If you find for the plaintiff, then I charge you, that if the defendant had breached his agreement, then the plaintiff was forced to breach his agreements with his advertisers, and that as a matter of law he is entitled to a judgment of indemnity for any potential suits brought against him by these advertisers. By this I mean, that in the event that any one of the advertisers in the future sues the plaintiff and recovers, then the defendant since he has breached the agreement must compensate the plaintiff for any judgements recovered as against him.

11. If you find for the plaintiff, then you must base you verdict for damages on one of the following alternatives:

A. The plaintiff has spent $58,980.86 for the production of these bowling score sheets. He still owes the sum of $2,800 to Gallup Polls and the sum of $6,047.71 for printing, and

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YORK, N.Y. 10017
(212) MU 4-1730

he further owes the advertisers the return of their payments of $39,762.86. making a total of $107,591.07. (EXHIBIT 35 for the amount expended and testimony of LASKY COMPANY and EXHIBITS 88 through 91 for payment of advertisers, EXHIBIT 77 for invoices LASKY COMPANY and oral testimony of plaintiff). To this sum you are to add any sum you find plaintiff's time, enterprenorial talents is worth above and beyond the sum of $107,591.07.

B. Your other alternative is to award the sum to the plaintiff of what he actually expended, that is the sum of $58,980.86, and the sum of which he now owes, that is $8,847.71 (Gallup Poll and printer) making it a total of $67,828.57, plus the sum you value plaintiff's time and enterprenorial talents are worth, together with a finding that

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W YORK, N.Y. 10017
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defendant is to indemnify the plaintiff in the event any of his advertisers sue.

12. In our concept of justice once the defendant has breached an agreement, and you so find, then you are to make the plaintiff whole and put him in the same place as he would have been had there not been a breach.

Dated: New York, New York
October 9, 1974

Respectfully submitted,

BRASHICH AND FINLEY
Attorneys for the Plaintiff

By _____
A Member of the Firm

20 East 46th Street
New York, New York 10017

HICH AND FINLEY
EAST 46TH STREET
YORK, N.Y. 10017
212) MU 4-1730

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

WINSTON E. KOCK, JR., :

Plaintiff, :

v. :

THE BRUNSWICK CORPORATION, :

Defendant. :

- -x

Index No. 73 Civ. 1947
M.E.F.

DEFENDANT'S REQUESTS TO CHARGE

Defendant requests that the following charges be given to the jury in the event of a submission of issues to the jury.

1. If you find that notwithstanding the language of the November 27, 1972 letter, plaintiff and defendant had agreed that all of defendant Brunswick's bowling centers would simultaneously, on a national basis, commence using plaintiff's score sheets, during the month of March, 1973, then you may find for plaintiff.

2. I further charge you that plaintiff has the burden of proving to you that he had the ability to deliver the second installment of 30,000 plastic score sheets and 2.1 million paper score sheets in September, 1973. If you find

that plaintiff did not have such ability, either because of his financial inability or otherwise, then you must find for defendant and award to it judgment for the cost of securing the additional 30,000 plastic score sheets and 2.1 million paper score sheets.

3. If you find for plaintiff and not for defendant, then I charge you that plaintiff is entitled to damages. In this action plaintiff is seeking damages for loss of expected profits and for injury to his business reputation. In connection with his claim for damages for loss of expected profits, I charge you that plaintiff has failed to demonstrate by competent evidence as distinguished from surmise and speculation, that he would have earned any profits from a continuation of the business, and that he is not entitled to an award for loss of expected profits. In connection with the claim for damages for injury to plaintiff's business reputation, I charge you that you must consider that plaintiff, prior to his entry into the contract with defendant was a salaried employee who was not in business for himself and he had not gained a reputation outside of the very limited area

to which his employment brought him, that is, the sale on behalf of his employer of television time to advertisers. If you are to award damages to plaintiff for injury to his business reputation, you must find that not only did he suffer such a loss of reputation but that such loss was caused by the acts of defendant.

4. I further charge you that you may find for plaintiff but that if you find he sustained no monetary damage, your verdict in his favor must be in a nominal amount only, and by that I mean the traditional six cents.

Dated: New York, N. Y.
October 3, 1974

Respectfully submitted,

BLUMBERG, SINGER, ROSS, GOTTESMAN & GORDON

By_____
A Member of the Firm
Attorneys for Defendant
245 Park Avenue
New York, New York 10017
Tel. 682-7700

U.S. DISTRICT COURT
FILED
OCT 18 1974
S.D. OF N.Y.

32 A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WINSTON E. KOCK, JR.

Plaintiff

-against-

THE BRUNSWICK CORPORATION

Defendant

73 Civil 1947 (MEF)

JUDGMENT
#74,821

The issues in the above entitled action having been brought on regularly for trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury, on October 8,9,10 and 11, 1974, and the Court having granted the dismissal of defendant's counterclaim, and the jury having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff WINSTON E. KOCK, JR., have judgment against defendant THE BRUNSWICK CORPORATION, in the amount of $79,464.76., and it is further,

ORDERED: That defendant's counterclaim be and it is hereby dismissed.

Dated: New York, N.Y.
October 16, 1974

Raymond F. Burghardt
Clerk

MICROFILM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WINSTON E. KOCK, JR., Plaintiff, vs. THE BRUNSWICK CORP., Defendant.	Before: HON. MARVIN E. FRANKEL, D.J., and a Jury. 73 Civ. 1947

New York, October 7,8,9,10,11,1974

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

WINSTON E. KOCK, JR., :

Plaintiff :

v. : 73 Civ. 1947

THE BRUNSWICK CORP., :

Defendant :

- x

October 7, 1974,
10:15 A.M.

Before:

Hon. Marvin E. Frankel,
District Judge and a Jury.

Appearances:

BRASHICH & FINLEY, ESQS.,
Attorneys for the Plaintiff,
Deyan Brashich, Esq., of Counsel
and
BURKE & BURKE, ESQS.,
Adrian Colley, Esq., of Counsel.

BLUMBERG, SINGER & ROSS, ESQS.,
Attorneys for the Defendant,
Frederick Newman, Esq., and
Allen M. Ross, Esq., of Counsel.

WINSTON E. KOCK, Jr., called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRASHICH:

Q Mr. Kock, what is your present occupation?

A I am a trainee in the money markets at Loeb, Rhoades & Company.

Q And how long have you been so employed, sir?

A December 17th of last year.

Q And prior to December 17, 1973, how were you employed, sir?

A I was in business for myself.

Q Why don't you speak up louder so the jury can hear you?

A I was in business for myself.

Q And under what name or style did you conduct your business, Mr. Kock?

A I used my name, Winston Kock and also Winston Kock Associates.

Q And what was the principal business of Winston Kock and Winston Kock Associates?

A Bowling score sheets.

Q I show you these two plastic score sheets and a series of other sheets and ask you if this in fact was

the product of your business, Winston E. Kock, or Winston Kock Associates; are these the bowling score sheets?

MR. NEWMAN: Wouldn't one of each do? I don't know why he is offering two or more of those.

Are they different?

MR. BRASHICH: They are the same.

A Yes, they are.

THE COURT: Have they been marked for identification?

MR. BRASHICH: Yes, they have, your Honor.

THE COURT: Let's refer to them in that way, please.

MR. BRASHICH: At this time plaintiff offers into evidence Plaintiff's Exhibit 36 of the pre-trial order, your Honor.

THE COURT: Any objection?

MR. NEWMAN: May I see it, please?

MR. BRASHICH: Yes.

(Handing)

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 36 received in evidence.)

MR. BRASHICH: May that be exhibited to the jury, your Honor, with your leave?

THE COURT: Yes.

(Plaintiff's Exhibit 36 is viewed by the jury.)

THE COURT: Go ahead, Mr. Brashich.

MR. BRASHICH: Thank you, your Honor.

BY MR. BRASHICH:

Q When did Winston Kock or Winston Kock Associates start doing business, Mr. Kock?

A June of 1972.

Q And prior to June of 1972 how were you employed, sir?

A I was in business with a partner, Al Tiede.

Q And under what name or style did you carry on this business, Mr. Kock?

A We used the name Tiede Enterprises.

Q And prior to going into business with Mr. Tiede what was your occupation, sir?

A I was an account executive with Blair Television.

Q And how long were you so occupied, sir?

A Three years, a little over three years.

Q And what was your salary at that time?

A Commission, sales, bonus totaled about $22,000.

Q Can you pinpoint that in time, when you left Blair?

A Summer of '71.

Q Prior to that in what line of business were you, sir?

A I was advertising, promotion director with Avco

Broadcasting television stations in the midwest.

Q Prior to that?

A With NBC television and radio in advertising and promotion in New York.

Q There came a time, did there not, that you and your partner, Al Tiede, met with somebody acting on behalf of the defendant; is that not a fact?

A Yes, it is.

Q Could you tell us when that particular meeting took place?

A January of 1971.

Q Is that January of '71?

A Excuse me, '72.

Q Where did that particular meeting take place, sir?

A At one of Brunswick Bowling Centers in Queens.

Q And who was present at that meeting?

A Myself, Al Tiede, Bill Kratzenberg, who was the national merchandise manager, and one of the gentlemen from that bowling center.

Q Do you recall what you said to Mr. Kratzenberg, what Mr. Kratzenberg said to you, what Mr. Tiede said to Mr. Kratzenberg; could you tell us the sum and substance of that conversation in January of 1972?

A We had gone to the bowling center to show Brunswick --

MR. NEWMAN: I object, your Honor.

THE COURT: He didn't ask you why you had gone. He asked you to give the substance of the conversation. Will you do that.

THE WITNESS: Yes. Well, part of it is we showed score sheets that he said he liked. Is that acceptable? That's what happened.

Q Could you tell us.

A We showed Bill Kratzenberg the score sheets that we had at that time some samples of and he said that Brunswick had been looking for national advertising for some time, that this was a very good idea that they hoped their local supplier would have been able to give it to him; that he hadn't and they were much interested in a proposal on a national score sheet basis.

Q And did he make any comment, did Mr. Kratzenberg say anything at that particular time with the actual, physical layout of the score sheet that you showed him?

A Well, Mr. Tiede had at that time a double page carbon copy score sheet, two pages with a piece of carbon paper in between. It was his concept, his design that the bowlers could keep the second page and take home their

score sheet because the first score sheet couldn't be taken home.

Mr. Kratzenberg said it was a nice idea but the bowling centers might be flooded with a lot of carbon paper and some extra pieces of paper and he really didn't think two pieces of paper was such a good idea, but the one with national advertising he would be interested in.

Q And did you discuss or was there any mention mention by you or by Mr. Tiede or by Mr. Kratzenberg relative to any specific national advertisers?

A He did not really want to have any fast foods because Brunswick did have hamburgers and hotdogs and some sort of counter facilities in their bowling centers. I had been talking with McDonald Hamburgers and they kind of liked the idea that they would be national --

MR. NEWMAN: I object to that, your Honor.

THE COURT: Gentlemen, the jury will disregard that reference to McDonald's.

THE WITNESS: He would not take a national fast food advertiser.

Q Subsequent to this meeting did you have any other communication from Mr. Kratzenberg, subsequent to January, 1972?

A He wrote us a letter, yes.

Q And did you ever see a copy of this particular letter?

A Mr. Tiede showed me a copy, yes, he did.

Q And do you recall what that letter said?

A That he was -- I believe he was much interested in the proposal.

MR. NEWMAN: You can introduce the letter. I have no objection.

MR. BRASHICH: Would counsel furnish me with the original of Exhibit B, I don't remember Exhibit B.

MR. NEWMAN: Is that March 29th?

MR. BRASHICH: No.

THE COURT: I had asked that exhibits to be offered be pre-marked and ready.

MR. BRASHICH: All of my exhibits are pre-marked.

THE COURT: Let's proceed without this and you will get to it at some later time.

Q Did there come a time, Mr. Kock, that you received another communication from Brunswick on or about March 29, 1972?

A I believe so, yes.

Q And I show you Plaintiff's Exhibit 2, a letter dated March 29, 1972, from a Carole Grant to Winston Kock and ask you if this is the letter that you received.

MR. BRASHICH: May I read the letter into the record, your Honor?

THE COURT: Has it been offered in evidence?

MR. BRASHICH: I offer this in evidence.

MR. NEWMAN: With the attachment?

MR. BRASHICH: With the attachment.

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 2 received in evidence.)

MR. BRASHICH: May I read the letter, your Honor?

THE COURT: Yes.

(Counsel reads Plaintiff's Exhibit 2 to the jury.)

Q And the list which was furnished to you, Mr. Kock, was that the list of the bowling centers which Brunswick then controlled?

A Yes, very much. Their full national list.

Q Now, you had testified that there came a time that you were no longer with Al Tiede. Could you tell us when that took place?

A June 1st of that year.

Q Now, how long were you together with Mr. Tiede and working with him?

A The end of the summer, September, until Jun 1, 1972.

Q During that particular time, if you know, Mr. Kock,

where was Mr. Tiede employed?

A He had a full-time job at CBS television.

Q And during that period of time were you employed in any other capacity except with this business that you were working with with Mr. Tiede?

A No, I was not.

Q Could you tell us what happened in June of 1972 when you terminated your relationship with Mr. Tiede?

MR. NEWMAN: I object. I don't see the relevancy of this line of questioning.

THE COURT: Why is that relevant, Mr. Brashich?

MR. BRASHICH: I am just trying to show the progression.

I will withdraw the question, your Honor.

THE COURT: All right.

Q Now, after you stopped working with Mr. Tiede did there come a time in June of 1972 that you had a telephone conversation with Mr. Kratzenberg?

A Yes, there did.

Q And could you pinpoint a date or roughly a date in June of 1972 when this telephone conference you say took place?

A It would have been the first week of June, 1972.

Q If you recall, could you tell me what Mr.

Kratzenberg said to you and what -- I will withdraw that question.

Who initiated the telephone call, you or Mr. Kratzenberg?

A I called Bill Kratzenberg in Chicago at Brunswick.

Q And if you recall, what did you say to Mr. Kratzenberg and what did Mr. Kratzenberg say to you during this particular telephone conversation?

A I was going ahead with the bowling score sheets. I wanted to make sure that Bill and Brunswick were still very much interested in the national advertising concept. He said yes, they were. We arranged for myself to set up some proposals. He explained a few things to me on the phone, that he could start me in March but not until then. I said fine. We draw up certain things on fast food again that he had reiterated and I put together a proposed contract and flew to Chicago on June 8th.

Q Now, is it not a fact, Mr. Kock, that the March date -- withdraw that question.

Did you request or suggest the March date during your conversation or was it Mr. Kratzenberg saying to you March, 1973?

A Mr. Kratzenberg wanted March. I would basically have preferred earlier because the fall season is the

larger national advertising season, more money is spent in the fall. But March was also acceptable to me because that was the only time he could get me going in all the centers. I accepted March.

Q And as a result of this particular conversation, Mr. Kock, did you have an agreement prepared?

A Yes, I typed up a list of how many bowling centers, when it would start --

THE COURT: Just answer the question.

THE WITNESS: Yes, I did.

THE COURT: Next question.

MR. BRASHICH: I call upon opposing counsel for Exhibit C or Plaintiff's Exhibit 3, a draft agreement.

MR. NEWMAN: I have a Xerox copy. Somewhere the original was misplaced with all these papers. I don't know where it is but this is a Xerox copy.

This is a Xerox of the letter that was marked and you can see the markings at the deposition.

MR. BRASHICH: The original is not in your possession?

MR. NEWMAN: No, it is not. I'm sorry, I apologize.

Q Now, Mr. Kock, I show you two pieces of paper dated June 8th and ask you if that in fact was the agreement that you had prepared after your conversation in early

June with Mr. Kratzenberg?

A Yes, it is.

MR. BRASHICH: Plaintiff at this time offers into evidence Exhibit No. 3, a certain document entitled "Agreement between Winstock E. Kock, Jr., and Brunswick Corporation," dated June 8, 1972. It is signed by Winston E. Kock, Jr. and unsigned by Brunswick Corporation.

THE COURT: Any objection?

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 3 received in evidence.)

MR. NEWMAN: May I read the agreement to the jury?

THE COURT: You may pass it to the jury. Refer to it as the document.

Are you going to read all the documents that come in? It is going to take a great deal of time.

MR. NEWMAN: This is not the agreement between the parties. It is a preliminary document.

MR. BRASHICH: Then I will submit it to the jury and would bring to their attention paragraph 2.

(Plaintiff's Exhibit 3 is viewed by the jury.)

THE COURT: Proceed, Mr. Brashich.

Q There came a time, did there not, that you visited Mr. Kratzenberg at Skokie, Illinois?

A Yes, sir, I did.

Q Skokie is very close to Chicago, is it not?

A Yes, it is outside of Chicago.

MR. BRASHICH: For the purposes of this trial, if I may, your Honor, Chicago and Skokie, may they be interchangeable?

THE COURT: If they don't mind, I don't mind.

Q And where did this agreement take place, Mr. Kock?

A In Mr. Kratzenberg's office at the headquarters of Brunswick.

Q And that was June 8, 1974?

A June 8th, yes; June 8th.

Q '72.

MR. NEWMAN: I have two comments. First of all it wasn't an agreement; that it was in fact 1972.

THE COURT: Yes, I think it would not be useful for you to continually refer to that as an agreement. It is a document. You can refer to it --

MR. BRASHICH: I am referring--

THE COURT: Wait until I finish. You may refer to it by its exhibit number. Later you may argue what you claim is its significance. It is perfectly clear on the face of it that it is not an agreement.

Q Now, your meeting on June 8, 1972, with Mr.

Kratzenberg, could you tell me what Mr. Kratzenberg said to you and what you said to Mr. Kratzenberg, what was the sum of this conversation?

A Bill looked over my proposed proposal, thought it was fair and reasonable, explained to me that March would be the start date, that he would work on getting his obligations out of the way from the previous supplier, that he would have plenty of time to do so since we were talking in June. We discussed my getting a marketing test so that national advertisers could see whether or not this had some recall factor, because that is what advertising is purchased for, to sell products. He allowed me and said I could do it in a bowling center here in New York, that Gallup Company test it.

I discussed Peabody, that Peabody and he had had many discussions on, again, national advertising; that he didn't see any problems; that they had been talked to numerous times about national advertising; that they had not yet come up with national advertising.

We also looked back and he couldn't find a contract he agreed at some point in time Peabody had at least a start date for a contract which would mean there would have been an end date and this might be one way of alleviating the problem.

He said he would take care of the problem. He would look into how to get the problem corrected so that March would be fine for me.

Q And were you supposed to meet with Mr. Kratzenberg the next day?

A He asked me to stay over and hopefully that I could come back and see him the second day after he had had time to discuss this with one of his superiors.

Q Did you in fact see Mr. Kratzenberg the next day?

A I went back to the headquarters building and apparently this superior was not available and Bill and I talked on the phone and I left him a handwritten memo of what we had talked about.

Q Did you see him personally face to face?

A No, I did not see him face to face.

Q You spoke to him on the phone?

A Yes, I did.

Q Is it not a fact, Mr. Kock, that you wrote out a handwritten memorandum, a letter to Mr. Kratzenberg relative to your earlier discussion?

A Yes, I did.

MR. BRASHICH: I ask opposing counsel for Exhibit 3-- their Exhibit D, our Exhibit 4.

MR. NEWMAN: Here it is (handing).

Q Now, I show you these four pieces of paper dated June 9th, starting "Dear Bill," and signed "Winston Kock, Jr.," and ask you if these are the documents you had left for Mr. Kratzenberg on June 9, 1974.

MR. BRASHICH: At this time, your Honor, we offer Plaintiff's Exhibit 4 into evidence.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 4 received in evidence.)

Q Now, if you recall, Mr. Kock, in this particular document did you discuss single start dates or end dates?

A Very much so. It is important. Advertisers buy nationally for a single start.

MR. NEWMAN: I object to these comments.

THE COURT: Yes.

MR. BRASHICH: May I have this shown to the jury?

THE COURT: When there is an objection, if you will contain yourself, Mr. Brashich, until I can rule on it.

The objection is sustained, the comments are stricken.

Mr. Kock, you are instructed to just answer the questions. If the answer is yes, stop after you have said yes.

All right.

THE WITNESS: Yes.

MR. BRASHICH: May this be shown to the jury.

(Plaintiff's Exhibit 4 is viewed by the jury.)

Q You had testified, Mr. Kock, that you spoke to Mr. Kratzenberg relative to a Gallup poll that you were planning to conduct; is that not a fact?

A Yes, it is.

Q Did Mr. Kratzenberg authorize you to use one of their facilities in New York for a Gallup poll?

A Yes, he did.

Q Did you write to Mr. Kratzenberg on June 21, 1972, with regard to that Gallup poll?

A Yes, I did.

MR. BRASHICH: I call upon opposing counsel for Exhibit 8, their Exhibit H.

MR. NEWMAN: Here (handing).

Q And I show you this particular letter and ask you if that is the letter that you sent to Mr. Kratzenberg on or about June 21, 1972.

A Yes, it is; yes.

MR. BRASHICH: At this present time plaintiff offers into evidence Exhibit No. 8.

MR. NEWMAN: No objection.

(Plaintiff's Exhibit 8 received in evidence.)

xx

Q And do you not say in that particular letter, Mr. Kock, and I quote, "I have also checked with the printer on what it will cost me more to put 'Welcome to Brunswick.' I will still pass it along to the advertisers and will still be able to put a Brunswick identification at the top of the sheet."

A Yes.

Q Subsequent to June 21, 1972, Mr. Kock, is it not a fact that you did have a Gallup --

MR. NEWMAN: If your Honor please, I do not believe --

THE COURT: Sustained. On direct examination, Mr. Brashich, a question that starts: Is not a fact, that can't end well. So you must stop leading.

MR. BRASHICH: Yes, your Honor.

Q Did you conduct a Gallup poll in one of the Brunswick facilities?

A Yes, I did.

Q Could you tell us when that took place?

A The last week of June, first week of July. It was a two-week test.

Q And where did that particular Gallup poll take place?

A Brunswick Bowling Center, I believe it is on

80th and York, 81st and York, somewhere up there, in Manhattan.

Q And during that particular period of time did you have a sample score sheet made up?

A Yes, I did.

Q And did you at any time forward it to Brunswick?

A Yes, I did.

Q Did you write to Mr. Kratzenberg at Brunswick with regard to the sample score sheet?

A Yes.

MR. BRASHICH: May I have from opposing counsel Exhibit 9, their Exhibit I?

MR. NEWMAN: Here you are, Mr. Brashich(handing).

Q Except for the handwritten notations on the top, Mr. Kock, is that the letter that you sent to Mr. Kratzenberg on June 30, 1972?

A Yes, it was or yes, it is.

MR. BRASHICH: I offer this into evidence at this present time as Plaintiff's Exhibit No. 9.

THE COURT: Mark it in evidence.

xx (Plaintiff's Exhibit 9 received in evidence.)

Q Did you, subsequent to the June 30, 1972, letter, in fact receive a letter from Brunswick relative to your proposal?

A Yes, I did.

Q And do you recall when you received that particular letter?

A I believe it was in July.

Q And I show you this particular letter and ask you if that in fact is the letter that you received from Kratzenberg on or about July 20th?

A Yes, it was, or yes, it is.

MR. BRASHICH: At this present time plaintiff offers into evidence as Plaintiff's Exhibit 6 a letter July 20, 1972.

MR. NEWMAN: May I see it for a moment?

MR. BRASHICH: Yes (handing).

(Pause)

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 6 received in evidence.)

MR. BRASHICH: May I read the first paragraph of that letter, your Honor?

THE COURT: Yes.

MR. NEWMAN: Your Honor, if he is going to read the first paragraph, he should read the second paragraph.

MR. BRASHICH: I would read it in total by your leave, your Honor.

THE COURT: All right.

(Counsel reads Plaintiff's Exhibit 6 to the jury.)

Q Now, after you received this letter from Mr. Kratzenberg, did you reply to it? Did you write a letter back to Brunswick?

A Yes, I did write a letter to Brunswick.

Q Did you write him a letter on or about July 31, 1972?

A Yes, I did.

MR. BRASHICH: I ask that opposing counsel produce Plaintiff's Exhibit 54, a letter from Mr. Kock to Mr. Kratzenberg, dated July 31, 1972.

MR. NEWMAN: I have no objection to your using the one that has been marked in the deposition.

MR. BRASHICH: You do not have the original?

MR. NEWMAN: No.

Q Now, Mr. Kock, I show you this document and ask you if this is a carbon copy of a letter that you forwarded to Mr. Kratzenberg.

A Yes.

MR. BRASHICH: At this present time plaintiff offers into evidence a letter dated June 31st from Mr. Kock to Mr. Kratzenberg.

xx (Plaintiff's Exhibit 54 is marked in evidence.)

(Counsel reads Plaintiff's Exhibit 54 in evidence to the jury.)

Q Subsequent to your letter of July 31, 1972, did you have an occasion to speak to Mr. Kratzenberg by telephone?

A Yes, Bill called me.

Q Do you recall what date that was, sir?

A Early part of August. August 9th or 10th. August 10th, I believe it was.

Q Could you tell us what Mr. Kratzenberg said to you and what you said to Mr. Kratzenberg during that conversation?

A He was calling me because he was eager to go ahead with the commitment of March as a start. He wanted me to commit to him so that he could get this in the works. And he asked could I commit myself? I said yes, that I would send him a telegram and I would follow it up with a letter and I would commit myself for the March start for the 200 centers.

Q Did there come a time when you in fact did send a telegram?

A Yes, I sent him the telegram the same day so he would have the commitment immediately.

MR. BRASHICH: I ask opposing counsel for my

Exhibit 56, a telegram dated August 10, 1972.

MR. NEWMAN: Here (handing).

Q I ask you, Mr. Kock, to read this telegram and I ask you is that the substance of the message that you sent to Mr. Kratzenberg?

A Should I read it?

Q Just read it to yourself, Mr. Kock.

A This is it.

MR. BRASHICH: At this present time plaintiff offers into evidence a telegram as Exhibit 56.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 56 received in evidence.)

MR. BRASHICH: May I read the message, your Honor?

THE COURT: Yes.

(Counsel reads Plaintiff's Exhibit 56 in evidence to the jury.)

Q Did a letter follow, Mr. Kock?

A Yes, it did.

Q When did you write that letter?

A Probably the next day or same day.

MR. BRASHICH: Could I have Exhibit 55?

MR. NEWMAN: Yes (handing).

Q I show you this particular letter and ask you if that is in fact the letter that you sent to Mr.

Kratzenberg after your telegram that you have just testified to.

A Yes, it is.

MR. BRASHICH: I offer as Plaintiff's Exhibit 55 a letter dated August 12th.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 55 received in evidence.)

MR. BRASHICH: May I read the first paragraph thereof, by your leave, your Honor?

THE COURT: All right, if there is no objection.

(Counsel reads first paragraph of Plaintiff's Exhibit 55 in evidence to the jury.)

Q Now, subsequent to August 12, 1972, did there come an occasion that you had other conversations with Mr. Kratzenberg?Did you speak to Mr. Kratzenberg after August 12, 1972?

A Some time afterwards, yes. I think he wrote me a letter before.

Q Do you recall the substance of that conversation?

A Well, that telephone conversation didn't take place until some time in November. I think he wrote me before that.

Q Did you receive any other communication from Mr. Kratzenberg?

A Yes, Bill wrote me a letter in September, October.

Q Did you receive a letter from Mr. Kratzenberg on or about August 23, 1972?

A Yes, I did, yes.

MR. BRASHICH: Could I have Exhibit 57, Mr. Newman?

(Pause)

MR. NEWMAN: You have that letter, I believe.

MR. BRASHICH: Yes.

Q Is this in fact the letter that you received in fact from Mr. Kratzenberg?

A Yes, it is.

MR. BRASHICH: I offer this as Plaintiff's Exhibit 57.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 57 received in evidence.)

Q Did you respond to that letter in early September, 1972?

A Yes, I did.

Q Did you write a letter to Mr. Kratzenberg?

A I did.

MR. BRASHICH: Could I have Plaintiff's Exhibit 58, letter of September 11, 1972?

MR. NEWMAN: Yes(handing).

Q I show you this particular document and I ask you whether or not that is a letter that you sent to Mr. Kratzenberg.

A Yes, it is.

MR. BRASHICH: Plaintiff offers this as Exhibit 56, your Honor.

MR. HERMAN: No objection.

xx (Plaintiff's Exhibit 58 received in evidence.)

Q Now, subsequent to September 11, 1972, did there come a time that you received some correspondence from Mr. Kratzenberg in early October?

A Yes, there did.

MR. BRASHICH: Could I have Plaintiff's Exhibit 13, your Exhibit M -- I'm sorry, Exhibit 12.

I have it. I'm sorry.

Q Except for the handwritten notations is that the letter that you received from Mr. Kratzenberg on or about October 12th?

A Yes, it is.

MR. BRASHICH: I will offer this into evidence as Plaintiff's Exhibit 12, and with your leave, your Honor, I would like to read the one paragraph letter.

THE COURT: All right.

xx (Plaintiff's Exhibit 12 received in evidence.)

(Counsel reads Plaintiff's Exhibit 12 in evidence to the jury.)

Q Did you reply to that letter, Mr. Kock?

A I sure did.

Q Did you write to Mr. Kratzenberg on October 12, 1972?

A Yes, I did.

Q Was that the same day that you received this letter?

A It was exactly the same day.

MR. BRASHICH: Could I have Plaintiff's Exhibit 13 together with attachment?

Q I show you this series of documents and ask you if that was your letter of response?

A Yes.

Q Is it not a fact thatattached to this letter there was attached another proposed agreement?

A Yes, there was a proposed agreement.

MR. BRASHICH: I will offer this into evidence as Plaintiff's Exhibit 13 and may we have it passed to the jury?

MR. NEWMAN: No objection.

(Plaintiff's Exhibit 13 received in evidence.)

(Jury views Plaintiff's Exhibit 13 in evidence.)

xx

Q During this period of time, Mr. Kock, were you actively meeting with advertisers?

A Yes, I was.

Q And during the month of November, 1972, did you obtain any advertisers?

A Yes, I did.

Q And could you tell us whom, if you know, you obtained as an advertiser in November of 1972?

A United States Army.

Q DId you receive an invoice or purchase order from them in November of 1972?

A From their advertising agency, that's correct.

Q And I show you this particular document and ask you whether or not that is the purchase order which you received from the United States Army's advertising agency?

A Yes.

MR. BRASHICH: At this present time I will offer into evidence Plaintiff's Exhibit No. 14.

MR. NEWMAN: I have no objection.

(Plaintiff's Exhibit 14 received in evidence.)

Q Subsequent to your October 12, 1972, letter to Mr. Kratzenberg, did you have any occasion to speak to him by telephone?

A He called me from Chicago, yes.

Q When was that, sir, if you recall?

A It would have been the second week in November.

Q And what did he say to you and what did you say to him during that telephone conversation?

A He said he was moving ahead on the score sheets, could I come to Chicago to meet with Bernie Rudo, introduce myself to Bernie Rudo, finalize some of the details of the score sheet for the exclusive use; when would I be free. I said I was free at any time. He asked if I could come in just before Thanksgiving. He then called back and said could we make it right after Thanskgiving, Mr. Rudo would be in town at that time. I said I looked forward to it, I was glad we were going to go ahead and I would be there.

Q Did there come a time you traveled to Chicago?

A Yes, I did.

Q Do you recall what date that was?

A November 27th.

Q And you did you travel by yourself or did you travel with someone else?

A My associate, John Weaver, went with me to Chicago. Both of us flew to Chicago.

Q Did you have a meeting with Mr. Kratzenberg on the 27th of November, 1972?

A We met in his office, yes, we did.

Q And what did he say to you and what did you say to Mr. Kratzenberg at your meeting?

A Bill had had time to look over the proposed contract that I had sent to him on October 12th. He said it looked fine to him. The March date would be satisfactory. It was the right date. He wanted us to again meet with Bernie Rudo down the hall. He asked about some of the advertisers. We mentioned the Army, Desenex. We didn't tell him all the advertisers at that time.

We went down the hall to Bernie Rudo. He felt we had a great thing. This was an image creation thing for Brunswick that they long wanted. They were looking forward to having the color in their bowling centers, that they were industry leaders. This was an industry innovation, to have color advertising in a bowling center as opposed to what had been up to that time local black and white score sheets.

Q Did you discuss shipping of these score sheets at that time?

A Bill said that he would get to me with all the shipping instructions for the 200 exclusive centers. He would try to provide that information to me and I said I needed it because I was going to be making contact with

the printers and I wanted to give him instructions.

Q You testified you had spoken to him with regard to the proposal or proposed agreement of October 12th --

MR. NEWMAN: Your Honor please, the constant leading of this witness I find objectionable. I don't rise very often because I would like the trial to go ahead but I think I have to rise at this point.

THE COURT: Yes, sustained.

Don't tell him what he testified to. Just ask him questions, Mr. Brashich.

Q Did you have any conversation relative to the October 12, 1972, agreement?

A Yes, we did.

Q What did he say to you and what did you say to him with regard to that agreement?

A He was glad to see we had changed the quantity from 30,000 to 60,000 plastic score sheets; that we recognized that March would be the start date; that it was good and that he wanted to finalize it; that March was the final date, this was it.

Q Did he give you a letter on November 27, 1972?

A Yes. John Weaver and I were in Mr. Rudo's office.

Q And I show you this particular document and ask you whether or not that is the letter that you received.

A Yes, it is.

Q And I ask you whether or not on that date he showed you another letter?

A Yes, he did show me the other letter.

Q Could you tell me, if you know, to whom that other letter was addressed to?

A It was sent to Walt Peabody.

MR. BRASHICH: Could I have Exhibit 16, your Exhibit E?

MR. NEWMAN: Yes (handing).

MR. BRASHICH: May I offer these two letters as Plaintiff's Exhibits 15 and 16? And may I read them, your Honor?

THE COURT: Well, they haven't been received yet

MR. NEWMAN: No objection.

(Plaintiff's Exhibits 15 and 16 received in evidence.)

(Counsel reads Plaintiff's Exhibits 15 and 16 in evidence to the jury.)

Q Did Mr. Kratzenberg say anything else to you during that particular meeting of November 27, 1972?

A Yes, he did.

Q And could you tell us what he said to you and what you said to him?

A He said this would come as no surprise to Peabody that he was being cancelled because they had had many conversations and letters; that he did not really want to sign my proposed contract at that time because he felt that he should at least give Mr. Peabody the satisfaction of sending the cancellation to him. He asked me if I would call him back in about two weeks to see what Peabody's reaction was to being cancelled and that he could foresee absolutely no problems in my going ahead for the 200 centers in March and he would get me the shipping instructions as soon as he could.

Q Did you make such a telephone call in December of 1972?

A Yes, I did.

Q And could you tell me what you said to Mr. Kratzenberg and what Mr. Kratzenberg said to you?

A I called him because I hadn't yet seen the shipping instructions, the quantities --

MR. NEWMAN: Could you ask the witness to confine himself to answering questions?

THE COURT: He just asked what he said to you and what you said to him.

THE WITNESS: I asked him where the shipping instructions were and he said he was going to get them to

me right after Christmas. I mentioned that Carter Walla- wanted to come on board testing a new product which was going into national distribution. I wanted him to write to Carter Wallace to confirm I held the contract because he really didn't give me anything but the cover letter and I didn't have a copy of the cancellation of the Peabody letter in my possession. He said he would do. I asked him if Peabody was upset? He said no. Peabody was out and Peabody didn't complain at all.

Q Subsequent to that date did Mr. Kratzenberg send you a copy of a letter which was directed to Carter Wallace?

A Yes, he did.

Q And I show you this particular copy with your name appearing in the left-hand corner as a blind copy. Is this the letter that you received from Mr. -- copy of a letter that you received from Mr. Kratzenberg?

A Yes, it is; yes, it is.

MR. NEWMAN: No objection.

MR. BRASHICH: I will offer this into evidence as Plaintiff's Exhibit 83 and may I read it to the jury, your Honor?

THE COURT: Yes.

(Plaintiff's Exhibit 83 received in evidence.)

xx

(Counsel reads Plaintiff's Exhibit 83 in evidence to the jury.)

Q Now, during this particular time did you receive any commitments from any other advertiser?

A Yes, I did.

Q Did you receive a commitment from Rumbrell Hoyt for Desenex?

A Yes, I did.

Q I show you this letter and ask you if this in fact was the commitment for Desenex?

A Yes, yes.

Q Was Desenex one of the advertisers on your bowling score sheet as it was printed?

A Yes, they were.

MR. BRASHICH: I offer Plaintiff's Exhibit 78 in evidence.

MR. NEWMAN: May I see it, please?

MR. BRASHICH: Yes (handing).

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 78 received in evidence.)

Q And during this period of time did you contact Lasky Company?

MR. NEWMAN: Again, your Honor, we are getting into this pattern of leading.

Q Did you contact the printer at this time?

A Yes, I did.

Q Could you tell me the name of the printer?

A Lasky Company.

Q Where are they located, sir?

A Millburn, New Jersey.

Q When did you first speak to them?

A I had had conversations ongoing since August.

Q And did they submit to you a proposal?

A Yes, they did submit estimates, printing estimates.

Q And I show you these two documents and ask you whether in fact those are the estimates or proposals that you received.

A These are the estimates.

MR. BRASHICH: At this present time plaintiff offers into evidence Exhibits 75 and 76.

MR. NEWMAN: Mr. Brashich, do you contend this is the contract you had with the printer or is this something that is merely preliminary?

MR. BRASHICH: Preliminary.

MR. NEWMAN: Will you be offering a document which is a contract?

MR. BRASHICH: The only thing which I will be offering subsequent to this will be the invoices after the

printing was completed.

MR. NEWMAN: I have no objection.

(Plaintiff's Exhibits 75 and 76 received in evidence.)

xx

MR. BRASHICH: If the Court will bear with me a moment.

THE COURT: Surely.

(Pause)

Q Did you receive estimates and shipping instructions from Mr. Kratzenberg at any time, Mr. Kock?

A Bill sent me in, I believe it was January, what seemed to be rough estimates of the quantities to be shipped to the bowling centers.

Q I show you this particular document together with attachment and ask you if these were the documents that you received in early January of 1973.

A Yes, it is.

THE CLERK: What number, please?

MR. BRASHICH: 20.

THE COURT: Suppose we stop for lunch at this point, gentlemen. Is that agreeable?

MR. BRASHICH: Yes, your Honor.

THE COURT: Let's take a lunch recess, ladies and gentlemen. Please come back at 2:15. We will resume then.

(Recess to 2:15 P.M.)

AFTERNOON SESSION

2:15 P.M.

(In open court; jury present.)

THE COURT: All right, Mr. Brashich.

MR. BRASHICH: Your Honor, plaintiff offers into evidence at this time Exhibit 20.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 20 received in evidence.)

W I N S T O N E. K O C K, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. BRASHICH:

Q Mr. Kock, there are a number of sheets of different colored paper which are attached to this particular exhibit, and I draw your attention to them. Could you tell us what those particular sheets are?

A These are the complete listings of the 200 Brunswick Bowling Centers with Mr. Kratzenberg's hand notated estimates of number of score sheets each bowling center should receive.

Q And these are the 200 bowling centers that you were going to supply score sheets exclusively for?

A Yes.

MR. NEWMAN: Your Honor please, the number is

approximately 180, if he will count them.

THE WITNESS: It says 136.

Q Subsequent to your receipt of Plaintiff's Exhibit 20, did you receive any further communication relative to shipping from the defendant Brunswick?

A Yes, I did.

Q And I show you Plaintiff's Exhibit 21 and ask you is this the information that you received from the defendant Brunswick?

A Yes, it is.

Q Does that information relate to two additional bowling centers that Brunswick had just acquired?

A Yes, these were to be added.

Q And who sent you that particular letter, if you know, or note if you know?

A Mr. Kratzenberg's secretary.

Q What is her name?

A Carole Grant.

MR. BRASHICH: Your Honor, at this present time plaintiff offers into evidence Exhibit 21.

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 21 received in evidence.)

MR. BRASHICH: With your leave, your Honor, may I read the first paragraph of that memorandum or note.

Counsel reads first paragraph of Plaintiff's Exhibit 21 in evidence to the jury.)

xx

Q Now, did you write to Mr. Kratzenberg subsequent to his letter to you of January 9, 1974?

A Yes, I did.

Q Did you write him on January 18, 1973?

A Yes, I did.

MR. BRASHICH: Could I have from opposing counsel my Exhibit 22, your Exhibit M, together with attachments.

MR. NEWMAN: There are certain handwritten notations on the letter which were not on the letter when received from Mr. Kock. These were made by Brunswick.

MR. BRASHICH: Do you have the attachment to this letter, Mr. Newman?

MR. NEWMAN: No, I don't.

MR. BRASHICH: Which is a postcard. Will you concede that this is the postcard that was attached to it?

MR. NEWMAN: From the letter it does not appear that it is a postcard attached to it. "We transport your numbers to my attached shipping projections which are herein enclosed."

MR. BRASHICH: I refer to paragraph 3, lines 1 and 2, sir.

(Pause)

MR. NEWMAN: It appears to be a double return postcard and unless I learn differently later on I will concede to you that this was the reference.

MR. BRASHICH: May I elicit some testimony on this point?

THE COURT: Yes. That might be a better way to do it.

Q Is this the postcard you enclosed in your January 18, 1973, letter or a facsimile thereof?

A Yes, this is one of the postcards that I did send.

Q I show you this particular letter dated January 18, 1973, and ask you if that is the letter which you sent to Mr. Kratzenberg to which was attached a facsimile of that postcard.

A This postcard was also attached, yes.

Q And I show you further, Mr. Kock, a series of pages on which appear certain written notations. Is that the list and the corrected estimate which you referred to in your letter which was also attached to your particular letter of January 18, 1973.

A Yes, this is the package that was sent. All three items, the letter, the attachments and the postcard.

MR. BRASHICH: I will offer into evidence as Plaintiff's Exhibit 2 the letter and the postcard.

MR. NEWMAN: I have no objection to the letter and postcard.

MR. BRASHICH: With your leave, your Honor, I just want to read the postcard into the record.

xx (Plaintiff's Exhibit 22 received in evidence.)

(Counsel reads postcard attachment to Plaintiff's Exhibit 22 in evidence.)

Q Now, I go back to the attachment that you had testified to, Mr. Kock, and ask you if you could tell me what these sheets represent and what they are.

A This is a typed written list identical to the Brunswick list which they had sent me. It also has Mr. Kratzenberg's estimates typed in, his total estimates of score sheets to be used in the 200 centers was something like five and a half, six million when we had said that we would deliver four and a half on an annual basis. I therefore applied a correction factor to his estimates as another estimate but said that I would likewise send a postcard to each individual center so they could reply to me their exact use situation.

I also combined and showed where combination shipments could perhaps be made in a close proximity and asked for his approval.

Q Did there come a time, Mr. Kock, that you

received this particular list back?

A Mr. Kratzenberg returned the list to me.

Q And I show you this particular piece of paper. Was that the covering note, memo, letter from Mr. Kratzenberg to you okaying shipping instructions.

A Yes, it is.

MR. BRASHICH: Your Honor, at this present time plaintiff offers into evidence Exhibit 70, which is the note and the shipping instructions.

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 70 received in evidence.)

Q Mr. Kock, could you pinpoint a time for the court when you received this exhibit back, Exhibit 70 back?

A I would say toward the end of January. It would be the end of January.

Q Now, at that particular time reference, end of January, did you receive a memorandum from Mr. Kratzenberg, a copy of which went to all center managers?

A Yes, I did.

Q I show you Plaintiff's Exhibit 63 and ask you whether in fact this is the document you received from Mr. Kratzenberg?

A Yes, it is.

MR. NEWMAN: No objection.

xx

(Plaintiff's Exhibit 63 received in evidence.)

MR. BRASHICH: If I may read the first paragraph thereof, your Honor.

(Counsel reads the first paragraph of Plaintiff's Exhibit 63 in evidence to the jury.)

MR. BRASHICH: May I have this exhibit passed to the jury, your Honor.

Q Now, subsequent to your receipt of the January 24th memo did you in fact have returned back to you all of the postcards that you had sent out?

A Not all of the postcards were returned to me.

Q Now, when if you recall, did you send out the postcards?

A Oh, middle of January.

Q And do you recall when the last date was that you received the last postcard?

A Some of the postcards came back in April. There might even have been one or two in May.

Q Subsequent to your first notice to all the bowling centers, did you follow that up with any other correspondence to the bowling centers?

A Yes, I did. I also wrote a letter to those at that time who had not sent all the postcards back. I sent a letter directly to that bowling center asking for

them to either please send the postcard back or send me some kind of information on how many score sheets they needed to begin March.

Q Now, I show you a number of postcards and letters and ask you whether in fact these are the postcards which you had returned back to you.

A Postcards and letters.

Q And at a random sampling could you read the dates -- I will withdraw that.

MR. NEWMAN: Thank you.

MR. BRASHICH: Your Honor, I offer all of these collectively as Plaintiff's Exhibit 62.

MR. NEWMAN: Your Honor please, I don't quite see the point of each of these letters and postcards. I will concede there is no question about it but that Mr. Kock sent letters to the -- sent --

MR. BRASHICH: May we have a side bar, your Honor?

THE COURT: All right, come up.

(At the side bar.)

MR. NEWMAN: It just appears we are cluttering up a record with something not in issue. Therefore, I will concede or let your Honor know if I have an objection or don't have an objection. I don't see the point of it.

THE COURT: Do these purport to be from the

centers to Mr. Kock?

MR. BRASHICH: Yes, your Honor. There was some question about late shipping and this is one of the defenses which Brunswick interposed. I am showing and making an offer of proof --

MR. NEWMAN: If it has to do with late shipment, we will withdraw the objection.

MR. BRASHICH: These were seen by opposing counsel during the examination before trial.

MR. NEWMAN: I knew they were marked but I didn't look at them.

THE COURT: As to the problem of going through them and seeing whether you object, if that is your only problem you will have to go through them and see if you object.

Are you also claiming they are irrelevant?

MR. NEWMAN: I am claiming they are irrelevant.

THE COURT: I will overrule that.So if you want a little time to go through them, you may do that and we will postpone receiving them until after a short recess this afternoon.

MR. NEWMAN: Very good. Thank you.

(In open court.)

MR. BRASHICH: Shall I proceed?

THE COURT: Yes, I think so and we will take care of that later on in the afternoon.

Q Mr. Kock, I show you Plaintiff's Exhibit 64 and ask you whether these are the two followups to the center managers, one which was sent on February 14, 1973, and the other one which was sent on February 26th?

A Yes, they are. They are two followups to the postcards.

Q And were those the papers that you used to have more copies made thereof?

A Yes. These are the originals.

Q And there are some pencil notations or ink notations on the second sheet. Do you know who made these particular notations?

A I made these on the sheets that were mailed on that date.

MR. BRASHICH: Your Honor,at this present time I will offer Plaintiff's Exhibit 64.

MR. NEWMAN: No objection, your Honor.

xx (Plaintiff's Exhibit 64 received in evidence.)

Q Now, after looking at the second sheet of Exhibit 64, Mr. Kock, could you tell us what you, in effect, wrote in your own handwriting on that particular piece of paper?

MR. NEWMAN: I object to the "in effect."

MR. BRASHICH: Withdrawn, your Honor.

Q Could you tell me what in ink you wrote on that piece of paper?

A "Rush, important." Underlined ' important as until I have the use situation information a delay in shipping will occur."

Q Did you make any other notation in the right-hand margin?

A I crossed off February 14th and wrote the mailing of this as 2-26, which was in effect when it was mailed.

Q Now, Mr. Kock, did there come a time that you spoke to Mr. Kratzenberg in late January or early February, 1973?

A Yes, I did.

Q Did you call him or did he call you?

A I called him.

Q And could you tell us what transpired or who said what to whom during that conversation that you called him?

A Well, I called him and he was or his secretary said he was out of town. I tried to reach Mr. Rudo, his immediate superior and vice president, and Mr. Rudo was

out of town.

Q Now, can you pinpoint the date of that particular conversation?

A First week of February.

Q I see. And did anyone call you back as a result of that telephone call that you made?

A Mr. Kratzenberg a couple of days later did call me back and then I --

Q October. And what did Mr. Kratzenberg say to you and what did you say to Mr. Kratzenberg during that particular telephone conversation?

A Well, I think this was the one where he said, "Gee, don't call Bernie Rudo, he goes up a wall. Call me."

I says that I wanted to talk to you and I'll call you back. I believe I went to John Weaver's, who was my associate at that time, and together we called Bill back in Chicago.

Q And then during that third telephone conversation what did Mr. Kratzenberg say to you and what did you say to him?

A We told him that Camden, New Jersey, which was a large Brunswick Bowling Center, was near where the Army advertising agency was located. The Brunswick Bowling Center had called and asked why they had gotten sixty,

sixty five thousand sheets from Peabody of local advertising when they were looking forward to getting mine in a month and that they didn't even use that many, I don't believe, in a whole year. They had a lot of old score sheets that they had been getting rid of because they knew I was coming on in March. All of a sudden they get the sixty five thousand. We called Bill to find out what's happening.

Do I say what he said to me?

Q What did he say to you?

A He said he would put a stop to that right away.

Q And did you confirm that telephone conversation by letter?

A Yes, we did.

Q Isn't it a fact that you wrote Mr. Kratzenberg on February 8, 1973?

A Yes, I did.

MR. BRASHICH: I ask my opposing counsel to give me the original of Exhibit 23, your Exhibit W.

Q I show you Plaintiff's Exhibit 23 and ask you whether or not this is the letter you sent to Mr. Kratzenberg after your telephone conversation.

A Yes, it is.

MR. BRASHICH: Plaintiff offers into evidence Exhibit 23, your Honor.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 23 received in evidence.)

MR. BRASHICH: With your leave, your Honor, I should like to read paragraph 4 thereof.

(Counsel reads paragraph 4 of Plaintiff's Exhibit 23 in evidence to the jury.)

Q Did you receive a reply to that letter from Mr. Kratzenberg?

A A reply? No, I did not.

Q Subsequent to that conversation did you ever have any written or telephone conversations with Mr. Kratzenberg?

A No, that was the last conversation I had with Mr. Kratzenberg.

Q When was the next time that you spoke to anyone at Brunswick?

A Middle of February, I believe it was. Carole Grant called.

Q And who called you from Brunswick?

A Carole Grant, Mr. Kratzenberg's secretary.

Q What did she say to you and what did you say to her during that particular telephone conversation?

A She was calling to introduce a gentleman by the name of Jerry Oles, who had become the new promotion

manager, director or merchandise manager of Brunswick and had replaced Mr. Kratzenberg.

Q What did she say to you, tell us?

A "Win, I would like to introduce you to Jerry Oles, he is going to be handling the job."

He came on the phone and he said, "My pleasure." He said, "I got a copy of your score sheet off the presses and it looks very good. I'm looking forward to working with you. Can you supply any score sheets in Canada?"

I said that my advertisers were United States advertisers but I knew some advertisers in Canada and I would try to put them in touch with him.

Q Was anything else said during that particular conversation?

A Yes. There was a bowling center in Texas who needed some plastic score sheets for a tournament that they were having. He asked if I would airmail down 50, 60, whatever it was, 100 plastic score sheets. I said I would take care of it right away. As soon as the plastic sheets were printed the printer would send them down to Ridglea Bowl.

Q Did there come a time subsequent to this telephone conversation on or about February 28th that you received a piece of correspondence from Mr. Jerry Oles?

A A letter came from Brunswick, yes.

Q I show you Plaintiff's Exhibit 24 and ask you as to these two pieces of paper whether or not this is the written communication that you received from Mr. Oles on or about that date.

A It sure is.

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 24 received in evidence.)

MR. BRASHICH: I would like to read that one into the record, your Honor, by your leave.

(Counsel reads Plaintiff's Exhibit 24 in evidence to the jury.)

Q Now, on or about March 1, 1973, did Mr. Rudo call you by telephone?

A Yes, he did.

Q Can you tell me, if you know, who Mr. Rudo is?

A He is the vice president in charge of operations of the bowling division of Brunswick Corporation.

Q Is he the person directly above or to whom Mr. Oles and Mr. Kratzenberg reported when they had their position of national merchandise manager?

A He is their immediate superior.

Q Could you tell me, sir, during that March 1st telephone conversation with Mr. Rudo what did Mr. Rudo

say to you and what did you say to Mr. Rudo?

A Mr. Rudo's secretary called and said "Just a moment, I have Mr. Rudo for you."

I got on the phone and he said "Win, do you know that Peabody is suing us in the State of California?"

I said "No, I do not know. What is it all about?"

He said he had not yet seen the particulars but he understood that Peabody was suing on a breach of contract in California, Peabody being a Florida company, Brunswick being a Chicago company.

He had called Bill Kratzenberg in North Carolina and he said there was no contract with Peabody. They looked through the files and saw no contract and that son of a bitch Peabody had gotten a shyster lawyer because what Mr. Peabody didn't understand was Brunswick was bigger than he was and it would be a cold day in hell if Peabody ever saw score sheets again in the Brunswick centers.

I asked him if there was anything I can do. He said no, you are fine, go ahead. I will keep you appraised and he said goodbye.

Q Did you write to Mr. Rudo on that day?

A I thought he was a little upset. It sounded that way --

THE COURT: He asked you if you wrote to him?

THE WITNESS: Yes, I did.

MR. BRASHICH: I ask my opposing counsel for Exhibit 26.

MR. NEWMAN: We don't have the original. We have a Xerox copy.

Q I show you Plaintiff's 26 and ask you if that is your copy of the letter that you sent to Mr. Rudo on March 1st.

A Yes, it is.

Q And was appended to that particular letter the paper score sheet which is Exhibit 36 that you referred to?

A I'm not sure if it was the final. I think it was the color print that we got from the printer that day, yes. The proof copy.

MR. BRASHICH: Your Honor, at this present time plaintiff offers into evidence Exhibit 26.

MR. NEWMAN: No objection.

(Plaintiff's Exhibit 26 received in evidence.)

MR. BRASHICH: If I may read the first line of that letter.

(Counsel reads the first line of Plaintiff's Exhibit 26 in evidence.)

Q Subsequent to March 1st, and your telephone conversation with Mr. Rudo, did you proceed to ship these

bowling score sheets?

A They were being shipped, correct.

Q Did you write to Mr. Oles and advise him of this?

A Yes, I did.

MR. BRASHICH: I ask opposing counsel for the original of Exhibit 67.

(Pause)

Q I show you Plaintiff's Exhibit 67 and ask you if this is the letter that you sent to Jerry Oles.

A Yes, it is.

Q Except for the handwritten notations and the underlinings?

A Yes.

Q And I show you Plaintiff's Exhibit 65 and 66 and ask you if copies of those particular exhibits or facsimiles thereof were attached to your letter to Jerry Oles dated March 9, 1973.

A Yes, they were.

MR. BRASHICH: I offer into evidence at this present time, your Honor, with your leave, Plaintiff's Exhibits 65, 66 and 67.

MR. NEWMAN: I have no objection.

(Plaintiff's Exhibits 65, 66 and 67 received in evidence.)

xx

Q Now, isn't it a fact, Mr. Kock, and I show you Exhibit.

To whom was Exhibit 66 sent to besides Mr. Oles?

A 66, to the district managers.

Q And to whom was Exhibit 65 sent to except beyond and besides Mr. Oles?

A All Brunswick Bowling Center managers, the full 200.

MR. BRASHICH: With your leave, your Honor, I should like to read paragraph 3 of Exhibit 65.

(Counsel reads paragraph 3 of Plaintiff's Exhibit 65 in evidence to the jury.)

Q Mr. Kock, did any center manager, any district or regional manager or Mr. Oles respond to these three exhibits?

A No, they did not.

Q Nobody wrote to you about them?

A No one wrote to me.

MR. BRASHICH: I would like to have these exhibits passed to the jury.

(Plaintiff's Exhibits 65, 66 and 67 are viewed by the jury.)

Q Now, did you have a telephone conversation with Mr. Oles during the week of March 19, 1974?

A Yes, I did.

Q Did Mr. Oles call you or did you call Mr. Oles?

A Mr. Oles called me from Chicago.

Q What did you say to him, what did he say to you?

THE COURT: Did you mean '74?

MR. BRASHICH: I'm sorry, your Honor, 1973.

THE COURT: Is that what you mean?

THE WITNESS: '73 is correct.

MR. BRASHICH: Thank you, sir.

A He called me. He asked if I had all of my shipping information. I did have some from the printer. He asked if I could come to Chicago on the 26th of March. I said I could. I asked him what was happening with the lawsuit. I hadn't heard anything since Bernie Rudo had talked to me. He said, well, we would discuss that when I came to Chicago on the 26th. I said, fine, that I would look forward to seeing you then.

Q Did you in fact go to Chicago on March 26, 1973?

A Yes, I did.

Q Did you in fact meet with Mr. Oles?

A Yes, I did.

MR. BRASHICH: Could I have Plaintiff's Exhibit 25 and Plaintiff's Exhibit 27.

MR. NEWMAN: I will object to 25.

THE COURT: Let's take a ten-minute recess.

(Jury excused)

THE COURT: Do you have the exhibit there which there is an objection to?

MR. NEWMAN: Yes.

THE COURT: Are you going to press this?

Let me see it.

MR. NEWMAN: Exhibit 25 is the Peabody complaint.

THE COURT: What is the purpose of the offer and what is the objection?

MR. BRASHICH: The purpose of the offer, and I will make a formal offer of proof, your Honor, Mr. Kock is a named defendant in that particular lawsuit. He was never served with it and he received it or saw it on March 26th when he was with Mr. Kratzenberg, as he has just testified -- with Mr. Cles, as he has testified. Immediately thereafter he was also shown Exhibit 27, which is a settlement of that lawsuit, attached to which was a schedule of start up dates in the various bowling centers controlled by the defendant Brunswick.

THE COURT: What is the relevance of this complaint?

MR. BRASHICH: There is an allegation there that the plaintiff Peabody had at the time a contract, an agreement with the defendant Brunswick which extended

beyond March 1st. In order to introduce into evidence the agreement between Peabody and Brunswick, I need that as a basis because otherwise this particular agreement would be coming out of thin air.

THE COURT: I don't know why it would be coming out of thin air. The allegation doesn't make it any more true than it would be without the allegation. If you want to show there was a lawsuit and that exhibit -- is it 27?

MR. NEWMAN: 27 is the settlement agreement.

THE COURT: -- was made in settlement of it, I assume that would be all right.

MR. NEWMAN: I will concede there is a lawsuit.

THE COURT: But I don't see how this allegation in a complaint proves anything at all. And if you are putting it in for the truth of it I don't understand that it is probative of that.

MR. BRASHICH: I am not putting it in for the truth at all, your Honor.

THE COURT: If you want to allege or if you want to stipulate that there was a lawsuit in which there was that allegation, will you agree to that?

MR. NEWMAN: May I see the allegation he has reference to?

THE COURT: Yes. Look at it and I will be out in

three minutes.

(Recess)

(In open court, jury not present.)

THE COURT: Where do we stand?

MR. BRASHICH: I would again press for the introduction of Exhibit 25 inasmuch as it is a verified pleading, verified by the treasurer and manager of Walter Peabody. There are certain allegations in that complaint which is verified.

THE COURT: The verification does not mean a single thing to me. I don't know why you said that twice. I let it pass the first time but what is the significance of its being verified?

Okay, none. Now why don't you proceed.

MR. BRASHICH: There are certain allegations in that particular complaint as to defendant Brunswick's unwillingness and refusal to live up to its agreement with Peabody, and there is reference therein as to the agreement which Peabody claims it had with the defendant Brunswick which are nowhere contained in the settlement stipulation or agreement of settlement, which is Exhibit 27.

Also, Mr. Kock is a named defendant in that lawsuit, although he was never served.

THE COURT: Look, there may be some theory on

which this could conceivably get in, but you are the proponent of the evidence and I haven't heard a shred of any justification for receiving it. So without any further attention to the ground of the objection, it is excluded.

Now, I understand Mr. Newman is nevertheless prepared, as he should be because you could prove it somehow, to agree to stipulate, or whatever, that Exhibit 27 represents a settlement of a lawsuit, if you want that because you indicated before that otherwise Exhibit 27 would hang in the air and not be intelligible. Whether that is true or not I don't know.

MR. BRASHICH: Would my brother stipulate that Brunswick was sued for an injunction and for breach of contract by Peabody in that Mr. Peabody claimed he had not lived up to his contract which resulted in the settlement, which is Exhibit 27?

MR. NEWMAN: I would be willing to stipulate on February 28, 1973, on behalf of Walt Peabody Advertising Corporation, an action was commenced against Brunswick in the courts of the State of California; that that action was founded on breach of contract, and that the action was settled by the document dated March 14, 1973, settlement agreement and release which I think we are calling

Exhibit 27.

MR. BRASHICH: That's correct.

THE COURT: Is that what you want?

MR. BRASHICH: I think that's all I am going to get so I am going to take that for this present time, sir.

THE COURT: I will ask the reporter then to read to the jury Mr. Newman's statement of your stipulation and with that we will also receive Exhibit 27 to which that statement refers.

(Discussion off the record.)

(Jury present.)

THE COURT: In the course of the recess, ladies and gentlemen, we were discussing exhibits. As a result of that discussion counsel reached a stipulation, and agreement which I will have the reporter state to you for your guidance and we are going to receive another exhibit on that basis of that agreement.

(Record read)

THE COURT: Did you have a question?

JUROR NO. 2: Will he state the lawyer's name sowe will know?

THE COURT: Thatwas Mr. Newman who was speaking but he was speaking for both of them. That's their agreement.

Exhibit 27 is an exhibit that Mr. Brashich had offered and is now going to be received in evidence.

(Plaintiff's Exhibit 27 received in evidence.)

Q When did you first see Plaintiff's Exhibit 27 or a facsimile of Plaintiff's Exhibit 27?

A I don't know how to answer that.

I'm not sure, your Honor, if this is exactly what I saw.

Q Did you see any documents or were any documents exhibited to you on March 26, 1973, by Mr. Oles?

A I'm really not sure if he did show me documents. He told me such documents did exist and that the ones that he had at that time were incorrect and he would have to mail a set to me corrected.

Q And did there come a time that he did mail you a document corrected?

A Yes, sir, he did.

Q And was this what you ultimately saw?

A No, this is not what I saw.

MR. BRASHICH: May I have this passed to the jury, please.

Q Now, going back to March 26th, who was present at the meeting that you had with Mr. Oles?

A Jerry Oles, myself, Mr. Irons, Brunswick's

attorney, and you, Mr. Brashich.

Q And do you recall what you said to Jerry Oles and what Jerry Oles said to you at that particular meeting?

A It was a full afternoon. A lot of things were said. Mr. Oles said to me that he had reached a settlement agreement with Mr. Peabody and he showed me some pieces of paper. I don't recall exactly what he said. The essence of this was that he reached a settlement. He took them back and said we will type up a list for you of the end dates-start dates which we have agreed to use with Mr. Peabody.

I said "Gee whiz, where does that leave me?"

He said "We are going to use Mr. Peabody and we will put you in when these end dates occur."

I said that really what I understood and I was in a lot of trouble because I had advertisers who had purchased advertising and I had them printed and they were looking for the end of March all 200 bowling centers.

He said surely they will understand there will be a substantial number of bowling centers that would use these national advertising sheets; that couldn't a small delay be explained to the national advertisers? At least understanding the way he was saying it there was supposedly going to be a whole lot of score sheets starting right away.

He tried to make it sound as if it weren't very bad.

We had a long discussion with Mr. Irons in the room about my legal possibilities. I was in a lot of trouble. I was out of business in effect. And would they please at least write me something to that effect immediately so I could at least go to my advertisers and explain to them what happened? They said they would get together and draft a letter and send it to me or at least show along with it, the established out of litigation end dates that Peabody and Brunswick had agreed on.

He said fine, and I came back from Chicago waiting for such a letter and document.

Q Now, prior to your meeting with Mr. Oles on March 26th did anyone contact you on March 14, 1973, from Brunswick?

A No, no one contacted me.

Q Did anyone speak to you with regard to this lawsuit in California?

A Only Mr. Rudo and then in Chicago on the 26th.

Q Between the 1st of March and the 26th of March no one spoke to you relative to the lawsuit in California?

A The only reference was my asking Mr. Oles around March 16th what had happened and his reply was, "I will

tell you about that in Chicago on the 26th."

Q And I show you Plaintiff's Exhibit 27, which the jury has.

Is there a date on this particular agreement, Mr. Kock, that you can see?

A 14th day of March.

Q Now, did there come a time that you received a letter from Mr. Oles dated March 27, 1973, which is Plaintiff's Exhibit 29 and which I show to you?

A Yes, this is the letter.

Q Is that the letter and the attachment that you received?

A These are the attachments that Mr. Oles sent me as to end dates.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 29 received in evidence.)

MR. BRASHICH: May I read that letter, your Honor, to the jury?

THE COURT: All right.

(Counsel reads Plaintiff's Exhibit 29 in evidence to the jury.)

Q Subsequent to March 27th did you have occasion to write Mr. Oles?

A Yes, I did.

MR. BRASHICH: Could I have Exhibit 30, please.

MR. NEWMAN: Here (handing).

Q And I show you Plaintiff's Exhibit 30 and ask you whether this is the letter that you wrote to Mr. Oles on or about March 30, 1973.

A Yes.

MR. BRASHICH: I offer this into evidence as Plaintiff's Exhibit 30.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 30 received in evidence.)

Q Now, Mr. Kock, in this letter you referred to an Irv Borak. Could you tell us, if you know, who Irv Borak is?

A He is a bowling center manager for Brunswick in Yonkers, New York.

Q Prior to your letter of March 30, 1973, did you have occasion to speak to Mr. Borak?

A Yes, I did.

Q What did Mr. Borak say to you and what did you say to Mr. Borak during that particular conversation?

A He called me and said that the plastic score sheets that he was using, which I had supplied,were--the ink was coming off. I said, by gosh, I would try to get them replaced immediately. I called the printer of the

score sheets in New Jersey--

Q Just tell us what you said to him and what he said to you.

A I said I would immediately get in touch with the printer and try to remedy it and make it good immediately.

Q Now, I show you Plaintiff's Exhibit 36 in evidence, part of it, which is the plastic score sheet. Is that what he was referring to during your telephone conversation?

A Yes.

Q Did you in fact have your shipper send -- make new plastic score sheets and send them to Mr. Borak?

A Yes, I did, immediately.

Q Did you so advise Mr. Oles?

A Yes, I did.

Q Was your advice to Mr. Oles contained in this letter?

A Yes, it was.

MR. BRASHICH: With your leave, your Honor.

THE COURT: What is that, 30?

MR. BRASHICH: This is Exhibit 30, your Honor.

(Counsel reads Plaintiff's Exhibit 30 in evidence to the jury.)

Q Did you in fact have conversations with your printer relative to these plastic score sheets?

MR. NEWMAN: If your Honor please, I will object to conversations with someone other than a Brunswick representative, not in the presence of Brunswick.

MR. BRASHICH: Withdrawn, your Honor.

Q Subsequent to March 30, 1973, did you in fact ship the 30,000 some-odd make good plastic score sheets?

A No, I did not.

MR. BRASHICH: May I have Plaintiff's Exhibit 69, please.

(Pause)

MR. BRASHICH: May we have a side bar, your Honor?

THE COURT: All right.

(At the side bar.)

MR. BRASHICH: Your Honor, I have been given a letter dated April 2, 1973, upon which is an envelope which has been attached to it which has a post-dated stamp of April 3, '73, received in Skokie, Illinois, and then there is another post-dated stamp of May 16, 1973.

Now, there is an additional notation saying "Found in supposedly empty mail equipment."

During discovery when I asked for any and all documents this was never shown to me.

THE COURT: The envelope or the letter?

MR. BRASHICH: This particular document and the envelope.

MR. NEWMAN: We gave you the whole file.

MR. BRASHICH: I did not see this and this was not marked. We had discussions about this.

MR. NEWMAN: It doesn't change the fact.

MR. BRASHICH: This is surprise. If you were going to claim that you received this on May 16th, you are telling me this at trial after I asked for discovery inspection and this was not referred to me before.

MR. NEWMAN: I believe you saw our entire file including this letter. I don't know how we can change the facts.

THE COURT: Wait just a second.

(In open court.)

THE COURT: Take five minutes, ladies and gentlemen.

(Jury excused)

THE COURT: Now, let me see the letter.

MR. NEWMAN: This apparently purports to be a response to the March 27th letter. It is dated April 2nd.

MR. BRASHICH: Just to advise the court and Mr. Newman, we had discovery in this case and you referred to me certain documents which you said was the totality of

your file. This was not included. You will recall we were in Youngstown, Ohio, I showed another document, which should have been in your file, to Mr. Oles and which was not given to me prior to that date. In response to our colloquy during that particular examination before trial I was flooded with about 30 or 40 additional documents which were contained in your file. This was never exhibited to me.

MR. NEWMAN: As far as the additional documents they were replies from center managers, things that we didn't have, didn't receive.

MR. BRASHICH: From your client. But this I have never seen. During our examination of Mr. Kock --

MR. NEWMAN: I am not going to challenge your statement that you haven't seen it before. However, I say we have made our file available to you that we have and this letter was there. You may not have looked at the letter. As a matter of fact I don't think you would have looked at it had I not called your attention to it.

THE COURT: Let's go one at a time and slow down so I can understand what is going on.

MR. NEWMAN: I don't think you would have looked at the envelope now if I hadn't called your attention to it at this moment. I don't think you looked at it when

you saw it before.

MR. BRASHICH: Your Honor, if I can go through my exhibits, I have made every photocopy of the documents which was referred to me for discovery inspection.

THE COURT: Including envelopes?

MR. BRASHICH: Everything. I have so many exhibits that I can't even find myself in them. I had little scraps of paper of undated memoranda.

THE COURT: Wait just a second. Is it going to be the defendant's contention that this was never received until May?

MR. NEWMAN: That's correct, your Honor.

THE COURT: And it is your contention, Mr. Brashich, that this was sent April 2nd? Does this account in any way, this letter, for the failure to ship the no charge plastic?

MR. BRASHICH: It says we will do so and then I am going to elicit testimony from the witness that we went into litigation thereafter.

THE COURT: With whom?

MR. BRASHICH: With Brunswick.

MR. NEWMAN: You initiated the litigation.

MR. BRASHICH: We did.

THE COURT: When did you initiate the litigation?

MR. BRASHICH: May 2nd.

MR. NEWMAN: I don't recall the date.

THE COURT: Wait just a second. Don't run off, please. There will be a question of credibility obviously or there may be, but what is the difference? If your client testifies he sent it on April 2nd and he sued on May 2nd, what is the difference?

MR. BRASHICH: I am just being caught at surprise.

THE COURT: I know you are being surprised but not every surprise hurts you. I have surprises here every day, some of which cheer me up. I am asking you really quite seriously how you are hurt. Because if you are hurt then we have to take care of it but I can't see, based on what I have heard thus far, how your learning this today, learning of this position today hurts you, nor can I even see how you are hurt if they didn't get it until May 2nd or May 16th, or whatever, because another perfectly plausible possibility is that this relates only to this envelope rather than to this letter. I don't know they go together.

MR. BRASHICH: I don't know if there has been any other correspondence. I will check my file.

MR. NEWMAN: I am not objecting to the letter. Mr. Kock says he sent it on or about that date, let it

come in. But the record should be clear when it was received.

THE COURT: Will you answer me, Mr. Brashich, how does this surprise hurt you? You sent the letter.

MR. BRASHICH: It wasn't received until May 16th?

THE COURT: Yes.

(Pause)

MR. BRASHICH: No real way that I can pinpoint, your Honor. I must be candid with the court.

THE COURT: Well, it is just as well to be candid.. It makes our lives easier. When you are planning to stop you ought to let me know.

MR. BRASHICH: I telegraph my moves as Mr. Newman knows.

THE COURT: I can see that it is disturbing and a problem but I don't see that it --

MR. BRASHICH: Will your Honor excuse me.

(Discussion off the record.)

THE COURT: Yes.

MR. BRASHICH: I will offer the exhibit, if I may, your Honor, without the envelope, and should counsel care to offer the envelope for whatever purpose he may on cross-examination or examining his own witnesses.

MR. NEWMAN: We are a corporation. I can't bring

you a witness. There is a stamp on it and I think they all go together.

THE COURT: No, I don't think they all go together. I am going to let the plaintiff offer the letter separately as the letter he says he mailed on April 2nd. There is a presumption of due delivery.

If the defendant, either by the use of this envelope, if it can be got in which it can't by itself, or in any other way wishes to show that the letter was not received until some time in May, it is perfectly open to the defendant to do that. But I don't think in light of the several representations that have been made to me that it is fair to require the plaintiff at this date to cope with the purported message on the back of an envelope over which he had no control and about which he would have had no knowledge contemporaneously.

So the fairest solution, in my judgment, is to do what Mr. Brashich asks, to let him offer the letter which you say, Mr. Newman, you are not going to dispute the authenticity of, which in any event was signed by the plaintiff here and then let the rest happen as it happens.

MR. NEWMAN: I submit if he offers anything he should offer his copy because he has asked for our copy and the copy is a letter together with an envelope.

THE COURT: If you wouldn't object to the authenticity, he can offer his copy.

(In open court, jury present.)

BY MR. BRASHICH:

Q Now, Mr. Kock, I show you this document and asked you is that a copy of a letter that you sent to Mr. Oles on or about April 2, 1973.

A Yes, it is.

MR. BRASHICH: At this present time, plaintiff offers into evidence Plaintiff's Exhibit 69.

THE COURT: Mark it.

MR. NEWMAN: May I see it, please?

(Pause)

No objection.

xx (Plaintiff's Exhibit 69 received in evidence.)

MR. BRASHICH: May I read a portion thereof, your Honor?

THE COURT: Yes.

MR. BRASHICH: Paragraph 2, "Jerry, this is not a small problem as these are major delays. If advertisers learn of them before we can be honest with them and offer them a solution, they will not only not renew, but will never buy score sheets again. Plus having the right to demand their money back as well as their spreading the word so

that no other national advertiser will ever buy national advertising score sheets. Brunswick and myself have a contract beginning March, '73, for all 200 bowling centers for a clean start. To this contract I have fully delivered 2.4 million score sheets which were shipped to your centers and which were purchased pursuant to by the national advertisers. Since I have not caused this major delay I must look to Brunswick for the solution. Standard advertising practice is offering to the advertiser his money back or offering a make good in the way of an additional page in a magazine or a comparable spot on television. This make good is at no charge to the advertiser. In our case this will be equivalent of giving the advertiser an additional run of 2.4 million in score sheets. The total sum involved is $112,600, as I had advised you by phone the end of last week. Jerry, here is the bright spot in the picture, as this total might be less than $112,600. This is because the direct mail price is based on $45,700 or at the rate of $2 per scissors ordered plus $1 football game ordered, whichever is the greater ending September 1, 1973. The solution then would be your paying me the advertising dollars generated so I would be able to either refund to the advertisers or use the money to pay for the make good. This would be only a total of $66,900 and

would carry Brunswick's guarantee to me of the difference between March to September direct mail total. Of course, should the direct mail total equal $45,700 you would not pay anything at that time on that portion. Jerry, I must state again that this major delay can cause irreparable harm to future advertising support. It is therefore obviously important that we offer this solution to our advertisers immediately, if not sooner. Expecting your early reply I am, as ever, sincerely yours, Win."

Q Did you ever receive a reply to Exhibit 69, Mr. Kock?

A In writing?

Q In writing.

A No, I did not.

Q Did you from Brunswick on or about April 9, 1973?

A Yes, I did.

MR. BRASHICH: Could I have Plaintiff's Exhibit 73, please?

MR. NEWMAN: If your Honor please, I am going to object to this letter.

MR. BRASHICH: May we have the grounds, your Honor?

THE COURT: Do you want to come here or state them from there?

MR. NEWMAN: Beg your pardon.

THE COURT: Do you want to do this at the side bar?

MR. BRASHICH: We can do it at the side bar, your Honor.

(At the side bar.)

MR. NEWMAN: The letter purports to state a conversation between a printer and an Irv Borak, not in the presence of any of the parties here. Mr. Kock is not saying I spoke to anybody. He said I also had the printer do something and he reports apparently what the printer told him. I assume the printer will be here to tell us what he did. He is one of the witnesses listed.

MR. BRASHICH: I have a printer under subpoena. I am offering the letter in evidence as correspondence between the plaintiff and the defendant.

THE COURT: yes, I know you are offering it but Mr. Newman says it contains hearsay.

MR. BRASHICH: May I see what portion he is referring to?

THE COURT: Which paragraph are you talking about?

MR. NEWMAN: The second full paragraph.

Also there is a page which does not belong. I

see something which has been marked in evidence before. It is a memo of February 27th.

It doesn't relate to this but this is the way we have it.

THE COURT: I know but is that objected to? Do you want that torn off?

MR. NEWMAN: I want it torn off but I would like people to know why I am doing it.

THE COURT: The paragraph of hearsay, do you want the letter with that deleted?

MR. BRASHICH: Yes, your Honor. I will offer it with that particular paragraph deleted.

THE COURT: Is there any objection to that, Mr. Newman, if it is blocked out physically?

MR. NEWMAN: No, I have no objection if that is blocked out physically.

THE COURT: You see it's done before, say, the end of tomorrow and certainly before the jury ever gets to see it.

MR. BRASHICH: Except for the last sentence. The last sentence has nothing to do with hearsay. That could stay in.

THE COURT: Well, what he stands ready to do is hearsay. I am going to rule that you either block out the

whole paragraph or I am going to exclude the letter.

MR. BRASHICH: All right, your Honor.

MR. NEWMAN: We are going to remove physically from the two-page letter the carbon copy from Oles to Snow dated February, 1973.

THE COURT: All right.

MR. BRASHICH: Shall we do that now or tomorrow?

THE COURT: You can do it overnight.

(In open court.)

THE COURT: Let me explain to the jury what happened. There is a letter that you are going to receive in evidence but it contains a paragraph that contains hearsay, which is not proper evidence. In order to handle that problem we are going to block out that paragraph and the rest of the letter will be allowed into evidence for whatever use it may have.

So if and when you see this letter -- what number is it?

MR. BRASHICH: 73, your Honor.

THE COURT: Exhibit 73 you will notice there is a paragraph covered over and don't uncover it.

All right.

BY MR. BRASHICH:

Q Now, I show you Plaintiff's Exhibit 73 and ask you

if this is the letter that you sent to Mr. Oles on or about April 9, 1973.

A Yes, it is, without the mark again.

Q Did you ever receive a reply to this letter, Mr. Kock, from Mr. Oles?

A No, I did not.

Q Subsequent to April 9, 1973, did you have occasion to speak on the telephone with Mr. Oles?

A Yes, I did.

Q Do you recall when that was?

A Well, just a few days later, I believe.

Q And do you recall what Mr. Oles said to you and what you said to Mr. Oles during that telephone conversation?

A He and I were talking about Brunswick's coming up with a solution for the advertisers which I felt I needed urgently to take to the advertisers. He said that Brunswick was unable or seemed to be unable to decide on what they would do, that they were still going to have meetings on it; that they had not yet come up with any solution; that he didn't have any real answer for me.

Q Now, Mr. Kock, during your conversations with Mr. Kratzenberg and your conversations with Mr. Oles, was there any discussion of numbers to be placed on the score

sheet?

A Yes, there were.

Q Could you tell us when you first spoke to either Mr. Kratzenberg or with Mr. Oles with regard to the numbering of the score sheets?

Let me withdraw that question.

When I say numbering, and I show you Plaintiff's Exhibit 36 in evidence, or a part thereof, could you tell the court and the jury what numbering means relative to bowling score sheets.

A Individual score sheets in most bowling centers, not all, will have a set of one number or perhaps a set of two numbers. If there are two numbers they are identical numbers. This is a matter of record keeping for bowling centers so that they would not have the same numbered score sheets on a bowling center at one time.

MR. NEWMAN: If your Honor please, I object to Mr. Kock qualifying himself as an expert on bowling and reasons for numbers being on the sheets. I think he has shown no foundation for his being able to give a reason why bowling centers and bowling proprietors would want numbers on the sheets.

THE COURT: You have not laid a foundation.

MR. BRASHICH: No, I have not, your Honor.

Q Was there any conversation or during the conversations with Mr. Kratzenberg, did he ask you to put numbers on the score sheets?

A He wanted -- in the beginning, which would go back to June of 1972, he wanted a coding of Brunswick on the score sheets which we talked about that it could perhaps be incorporated into numbers on the score sheet, such as a B with a number following. Beyond that, other than score sheets are numbered by pad, there was never any discussion other than numbers.

Q Now, I show you page number 3 of Exhibit 4 in evidence, which is the letter you wrote to Mr. Kratzenberg on June 9, 1972, and I refer you to the information contained there. Was that placed there as a result of your conversation with Mr. Kratzenberg on June 8, 1972?

A Yes, the coded numbers were in response to that June 8th meeting.

Q In any of your correspondence with Mr. Kratzenberg or with Mr. Oles that you have seen, was there anywhere contained a request that these bowling score sheets be consecutively numbered?

MR. NEWMAN: It says so in what you have just shown the witness but haven't read to the jury.

MR. BRASHICH: Is that an objection to the question?

MR. NEWMAN: I object to the question, yes.

Q In anywhere--

THE COURT: Well, at that point you might as well read what Mr. Newman is referring to.

MR. BRASHICH: Paragraph 5 of Exhibit 4, letter of June 9th with attachment.

5,"Brunswick desires their name on their correspondence sheets. If this name must be printed, it is costly before another printing press run and can cost too much. However, if acceptable, consecutive number coding can be so coded. Now coded, could be coded."

MR. NEWMAN: That's consecutive numbers.

Q Did Mr. Kratzenberg or Mr. Oles ever ask you that each center receives totally consecutive score sheets?

A They never requested that.

Q Did Mr. Kratzenberg authorize you to combine shipments to various bowling centers into one shipment?

A Yes, he did allow combination shipments.

Q I show you Exhibit 70 in evidence and ask you is that your authorization for combined shipments?

A Yes, it is.

Q And who was to distribute these bowling score sheets once they reached the combined shipping point?

A Brunswick.

Q That is, was it done by Brunswick employees or was it done by you or someone acting on your behalf?

A Brunswick employees.

Q Subsequent to your shipping of bowling score sheets to Brunswick and prior to May 2, 1973, did anyone call you from Brunswick with regard to consecutive numbering of score sheets?

A No, they did not.

Q I show you Plaintiff's Exhibit 32 and ask you did you receive that letter on or about May 2, 1973?

A Yes, I did.

MR. NEWMAN: I don't seem to have a record of a 32. It may be my bookkeeping but has that actually been marked?

(Pause)

JUROR NO. 6: If we have a question about an exhibit when should we put the question?

THE COURT: What you had better do is write a little note on a piece of paper and see that the clerk gives it to me. If you need some paper we will give you some.

JUROR NO. 6: Well, I have a question.

THE COURT: Mr. Swansiger, supply the jurors with paper, please.

(Pause)

THE COURT: All right, Mr. Brashich, I think Mr. Newman is trying to hand you that piece of paper.

MR. NEWMAN: I have no objection to it but none of this at this table has a record that it's actually been offered before.

THE COURT: If there is no objection let's proceed.

MR. BRASHICH: At this present time plaintiff offers into evidence Exhibit 32, a letter of May 2, 1973.

MR. NEWMAN: No objection, your Honor.

xx (Plaintiff's Exhibit 32 received in evidence.)

MR. BRASHICH: May we approach the side bar, your Honor?

THE COURT: It is 4:25 and we are going to quit in about five minutes. So can you suspend at this point?

MR. BRASHICH: Yes.

THE COURT: In that case what I think I will do is excuse the jury. You don't have to approach the side bar, we will just talk about it after the jury goes out.

We are going to excuse you for the day. Let me ask that you turn in your exhibits and you may give your questions to the clerk and we will reconvene at 10:30 tomorrow morning.

JUROR NO. 2: This gentleman wasn't introduce to the jury.

THE COURT: He is my law clerk. There are a lot of people who won't get introduced to you who are in the courtroom but nobody you should get suspicious of. When there is a really hard question, we take a recess and he gives me the answer. I had not wanted to advertise that but now you know.

Have a pleasant evening.

(Jury excused)

MR. BRASHICH: Your Honor, may I have a concession from opposing counsel that this action was filed on April 26, 1973? Rather than having the file brought up.

THE COURT: Well, the file is here, so if that is when it was brought we can get the file or have a stipulation.

MR. NEWMAN: I see the summons is dated May 2nd. I just don't know offhand when it was filed.

THE COURT: Look, I will have my brilliant law clerk, whose name is Phillip J. Ward, and who, as I said, answers all the hard questions, look in the file and tell you and then you will know. Then you can state it on the record, okay?

MR. BRASHICH: Thank you, sir.

THE COURT: Anothing thing I want to tell you is that

Miss Merion, juror number 6, wrote this note.

"For what purpose aren't the single and double asterisks by the dates on the list of expirations on Exhibit 27."

I will mark that Court Exhibit 1, Mr. Brashich, Mr. Newman, you are now acquainted with the question. I would like you to tell me just before we start in the morning, in the course of the testimony, you propose to answer it and then I will tell Mrs. Merion so she will know that we haven't ignored it.

MR. NEWMAN: I believe we can answer that question, your Honor.

(Discussion off the record.)

THE COURT: In any event, whatever it is I assume you are going to answer it in some competent way and I will tell her that counsel are aware of the question and it is up to them to see whether it will be answered, and I am apprised that it probably will be answered during the course of the evidence.

All right, 10:30, gentlemen.

(Adjourned to October 8, 1974, at 10:30 A.M.)

WIN TON E. KO JR.

v. 73 Civ. 1947

THE BRUNSWICK CORP.

October 8, 1974
10:30 a.m.

(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, gentlemen. Juror No. 2 is missing. It's around 10:45 now. I am not myself desperately anxious to wait for him.

Is he now here?

THE CLERK: Yes, your Honor.

MR. COLLEY: Your Honor, I have a prior commitment which I have to meet at about noontime and I would like to, if possible, be excused around ten of 12:00. Mr. Brashich would continue, if that would be all right with your Honor, and you might indicate to the jury that I would be leaving, if that would be okay.

THE COURT: They may even notice it.

Do you want me to conduct a ceremony of some kind?

MR. COLLEY: No. I just didn't want to leave abruptly.

THE COURT: Why don't you slip out quietly? We

don't have to announce it.

I understand the juror is here and we can proceed now.

I wish you would get organized and not stand up suddenly when I ask to have the jury brought in.

MR. BRASHICH: My apologies.

I was wondering whether the Court will allow me to call another witness at this time and break Mr. Kock's testimony inasmuch as my witness, the printer, does have prior commitments later on this afternoon.

THE COURT: Is your direct examination almost completed?

MR. BRASHICH: I would say no more than another twenty-five minutes to a half-hour.

THE COURT: Why don't you complete the direct?

Is that agreeable with you, Mr. Newman, and then interrupt for this other witness?

MR. NEWMAN: It seems to me it's a better sequence if we are going to have an interruption, we should have the other witness come on.

THE COURT: Would you prefer that?

MR. NEWMAN: Yes.

THE COURT: I gather Mr. Brashich would, too.

MR. BRASHICH: Yes, I would.

THE COURT: Then I bow to your joint judgment.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

Two things: First, sometimes because of the convenience of witnesses or for other reasons we interrupt the testimony of a witness to hear some other witness. We are going to do that now. We are going to interrupt the testimony of Mr. Kock to hear a printer, as I understand, that will testify for the plaintiff.

Secondly, let me simply acknowledge that we are all now acquainted with your question, Mrs. Marion, about the asterisks on that exhibit and I am advised by counsel that in due course that question will be answered by the evidence.

All right, Mr. Brashich.

MR. BRASHICH: By your leave, your Honor, good morning, ladies and gentlemen.

Plaintiff calls Richard L. Bersch.

R I C H A R D L. B E R S C H, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRASHICH:

Q Mr. Bersch, what is your present occupation, sir?

A I'm executive vice-president of the Lasky Co.

Q And how long have you had that particular position, sir?

A That particular position, about three months.

Q And prior to that date what was your position? What was your employment?

A Vice-president of Lasky Co.

Q And how long were you employed as vice-president of Lasky Co.?

A Approximately ten years.

Q And if you know, sir, what does Lasky Co. do?

A We are designers and lithographers, printing.

Q And how long, if you know, has Lasky Co. been in business?

A Fifty-six years.

Q And are you acquainted with Winston Kock, the plaintiff in this action? Have you met him?

A Yes.

Q When did you first meet Mr. Kock, sir?

A I would say approximately two years ago.

Q Now, sir, just to pinpoint a date, when, approximately two years ago, did you first meet Mr. Kock?

A I'll be honest with you. I don't remember the day or the month, but I think the project itself we were

working on for Mr. Kock was delivered in March of '73. So I would say it was probably around four or five months prior to that time.

Q Now, I show you Plaintiff's Exhibits 75 and 76 in evidence and ask you whether or not you had seen these two particular documents, sir.

A Yes.

Q Were those prepared by you?

A By my people, yes.

Q And did you see them before they were given to Mr. Kock?

A Yes. They were mailed to him.

Q And does your name appear anywhere on those two documents?

A These are both what we call estimates. And, yes, I signed both of these estimates.

Q Could you tell us, sir, what Exhibit 76 in evidence refers to?

A Those are, I guess you would call them, overhead projection bowling sheets or score sheets.

Q And what does Exhibit 76 in evidence refer to?

A Those are actually printed pads in four-color process. 250 sheets per pad.

Q And did there come a time, sir, that you actually

did print for Mr. Kock these score sheets?

A Yes.

Q And these overhead score sheets?

A Yes.

Q And do you recall when you gave these estimates to Mr. Kock?

A I think it was probably around -- they were delivered in March. So I would say three, four months prior to that. September, October, November or December, probably.

Q And do you recall what price you quoted Mr. Kock for the paper score sheets?

A I didn't study the pricing on that again, but whatever is written there. If you want me to read it off, I will.

Q I show you Exhibit 75 and ask you, does this refresh your recollection with regard to the price that you quoted Mr. Kock?

A Yes, $37,500 for the printed sheets.

Q And what amount, what number of sheets are we talking about when you refer to $37,000?

A It's 2,500,000 sheets, padded in pads of 250.

Q And I show you Exhibit 76 and ask you if that refreshes your recollection as to how much you quoted Mr.

Kock for the plastic score sheets?

A We gave him two prices, one for 30,000 at $4,800, and 50,000 for $7,800.

Q Now, just so the jury knows and that I know, I show you Plaintiff's Exhibit 36 comprising a paper score sheet and a plastic score sheet and ask you whether in fact those were the score sheets thought of at the time you quoted the price to Mr. Kock.

A Yes. Very similar to this. They didn't end up exactly -- you know, the original layout was slightly different, but basically the idea and everything was exactly the same, yes.

Q Did there come a time that you did in fact print the paper score sheets?

A Yes.

Q Was that at Mr. Kock's direction?

A Yes.

Q Now, did there come a time that you were responsible for the printing of the plastic score sheets?

A Yes. They were running simultaneously.

Q And I show you Plaintiff's Exhibit 77, a series of seven invoices, and ask you if you can identify those invoices. Have you ever seen them before?

A Yes, I see all my invoices before they are

processed.

Q And were these invoices prepared by you or by your company?

A Yes.

Q And were they sent to Mr. Kock?

A Yes.

Q And do those invoices refer to the plastic score sheets and the paper score sheets, Plaintiff's Exhibit 36?

A Yes.

Q I see, sir.

MR. BRASHICH: At this present time plaintiff offers into evidence Exhibit 77.

(Pause)

MR. NEWMAN: Aren't these in part duplicates?

MR. BRASHICH: Yes, they are.

MR. NEWMAN: I would suggest that we offer the originals instead of duplicates. I think there are four invoices here. I would have no objection to the invoices themselves, but I don't think we ought to have the numbers repeated twice.

MR. BRASHICH: I would accede to my brother's suggestion and offer into evidence as Plaintiff's Exhibit 77 three invoices dated, respectively, March 22, '73,

March 22, '73, and May 22, '73.

(Plaintiff's Exhibit 77 is received in evidence.)

Q Now, sir, did there come a time that Mr. Kock paid you for this work?

A Let me explain it in my own words. I think it will be easier.

When Mr. Kock came to us we didn't know Mr. Kock, and I think in business today we all realize that without credit, good credit references, you just don't proceed on any sizable kinds of contracts.

Mr. Kock came to us through a recommendation of a mutual friend from another customer of mine, and Mr. Kock, I think, had been around to many printers in the City pricing out this particular project. When he came to us we also gave him estimates for this job. And he came to us and said that "your figures are good. I would like to award you the contract."

I says, "Well, Mr. Kock, we would be very happy to do it for you, but we are talking about a contract that is going to run somewhere in the neighborhood of $40,000, and you, as an entrepreneur, unless you can substantiate that you have these funds behind you, we would require you to pay a third down, a third with the proofs, and a third COD, before we would ship anything."

And he accepted this. He says that "I understand, you know, why you have to do these things," and I will not forget the first time he came back, because he came back with several checks from, I think, family, friends, relatives. He really believed in his product and throught it was a viable thing.

THE COURT: Wait just a second. What is the pending question?

MR. BRASHICH: The question, your Honor, was, "Did there come a time that Mr. Kock paid you for these score sheets?"

THE COURT: Yes.

Mr. Bersch, just answer yes or no.

THE WITNESS: It was paid prior to delivery.

THE COURT: Please follow my instructions.

Like other witnesses you are simply to answer the questions. If a question is answerable by yes or no, simply do that.

THE WITNESS: Okay.

Q Now, sir, do you recall how much money Mr. Kock paid you for these projects?

A Not without seeing the final --

Q I show you Plaintiff's Exhibit 77 in evidence and ask you whether in fact this refreshes your recollection.

A Yes.

Q And, sir, how much in fact did Mr. Kock pay you for the score sheets?

A He paid us a total of $45,020 for both items. I think. Let me see.

(Pause)

There is one invoice here for $45,020, another invoice for $3,963.12.

Q And does that invoice at all refer to a sum paid by Mr. Kock on account?

A Yes.

Q And what is that sum, sir?

A $41,200.

Q The $41,200, does that satisfy your invoices for the paper and the plastic score sheets?

A Yes, at the beginning. There were certain corrections and changes that made the price change slightly.

Q Is there presently, at this present time, due and owing from Mr. Kock to your firm any sums, and if you can refresh your recollection, do so.

A Yes, there is a balance of $5,274.10, which is some of the office and the preshipping charges, which is the freight and the packing of the material.

Q Are you at all materially interested in this particular litigation?

A Rephrase your question to me.

MR. BRASHICH: I will withdraw that question.

Q Are you getting paid for testifying here?

A No.

Q Are you at all interested in this litigation between Mr. Kock and Brunswick?

A No.

Q Do you know Brunswick Corporation?

A No.

Q Do you do any business for them?

A I don't believe so. We may have. I don't believe so.

Q Now, sir, just as an aside, could you tell us, if you know, a list or several customers that you have at this present time in Lasky & Co. --

MR. NEWMAN: I object, your Honor. Irrelevant.

THE COURT: Sustained.

Q Now, subsequent to the printing and shipping of the bowling score sheets, did you have any occasion to have further conversations with Mr. Kock?

A We were in constant touch with Mr. Kock as each step progressed of setting up mechanicals and proofs and

things like that.

Q After you shipped, did you speak to Mr. Kock at any time? Yes or no.

A Yes.

Q At any time did you speak to an individual by the name of Irvin Borak?

A I'm not sure if I spoke to him, but one of my associates spoke to him. I don't remember exactly who spoke to him.

Q Now, at any time did Mr. Kock ever say to you that there was some problem with the plastic score sheets?

A Yes.

Q Could you tell us what Mr. Kock said to you and what you said to Mr. Kock relative to the plastic score sheets, which are Plaintiff's Exhibit 36 in front of you?

A Mr. Kock called me one day -- I don't remember exactly when, but after the material had been shipped -- and said that "we had a problem with the plastic acetate sheets."

I asked him what the problem is.

He says they had received several complaints that the material or the ink was coming off and they were scratching -- the ink itself was being washed off.

I said, "What is happening with it?"

He said, "It would be better for you to get first-hand information, so why don't you give this bowling alley" -- someplace in New York -- "a call?"

So, I think -- I don't remember if I did it myself or one of my associates called him, and what they told us was --

MR. NEWMAN: I object to this statement, your Honor, in light of the fact that the witness is not a party to that conversation. He is just reporting something somebody told him.

MR. BRASHICH: I agree, your Honor.

Q Can we pinpoint that date? You know, was it March, was it February, was it May, April?

A It had to be after the things were delivered. The shipments went around March, so it had to be between April and May, in that time period.

Q Now, talking about the plastic sheets, sir, was that printed, if you know?

A Yes.

Q And were both sides printed or one side printed, if you know?

A We only print the underneath side.

Q Was printed?

A Yes.

Q And if you know, when you prepared this particular plastic score sheet, where on that score sheet would any writing appear in normal use, underneath or on top?

A On the top side.

Q And were you given any specific indications relative to that particular score sheet?

A Basically the things you outlined there.

Q Now, sir, after this initial telephone conversation with Mr. Kock and after something else, whatever it was, happened, did you have a subsequent conversation with Mr. Kock?

A Yes.

Q When was that?

A Within ten days after the original conversation.

MR. NEWMAN: Your Honor, please, could you caution the witness that he is not to relate conversations that were not had by him in this conversation that he is now having with Mr. Kock? I fear that we may be having Mr. Bersch report and read into evidence a conversation which someone else may have had with a third party, and I would just appreciate -- or I may do it myself -- call it to the witness' attention that that is not proper testimony.

THE COURT: Do you expect anything like that, Mr. Brashich?

MR. BRASHICH: With your leave,your Honor.

(Pause)

THE COURT: Well, maybe it's simpler if I just do what Mr. Newman asked.

Don't tell us about any conversations of other people or any things you heard from other people in telling us about this conversation with Mr. Kock. Do you understand, sir?

THE WITNESS: I understand, but I don't think I would be able to answer the question without reporting the facts that were reported to me to see what was wrong.

THE COURT: I see.

Then the objection is sustained.

MR. BRASHICH: I don't think there is a pending question.

THE COURT: Well, then I don't sustain any objection.

Ask a question.

Q Did there come a time, Mr. Bersch, that you had a conversation with Mr. Kock?

A Yes.

Q And would you tell us, please, what you said to Mr. Kock and what Mr. Kock said to you, specifically directed to --

MR. BRASHICH: May I lead, your Honor?

THE COURT: Yes.

Q -- to the reprinting or redoing of the score sheets? And by that I mean -- don't tell me what the problem was, just tell me what you said to Mr. Kock relative to the reprinting of the score sheets, and what he said to you relative to the reprinting of the score sheets.

A I'll try.

We agreed that there was a problem and I told Mr. Kock it could be handled in one of two ways. I said we could either give a credit or replace the merchandise. I felt in his case, since it was an ongoing business, a credit was ridiculous. What was needed was to replace the merchandise or a portion of the merchandise that was damaged.

Q Now, when you said credit to Mr. Kock, was that a credit of $37,000 which is in Plaintiff's Exhibit 75, or is it a cash --

THE COURT: Why don't you just ask him what credit it was?

A We would be giving a credit on the portion of acetate sheets that were not usable.

Q And what did Mr. Kock say to you, just with regard to this segment of the conversation, if you recall?

A I can't recall the exact words, but he said, "Fine, I will let you know as soon as I know the extent of the problem."

Q And did you have a subsequent conversation with Mr. Kock?

A Yes.

Q And could you tell us when that took place?

A I really can't pin down dates for you at this time, but within two to three weeks after that.

Q And at that particular time what did Mr. Kock say to you and what did you say to Mr. Kock?

A He told me that Brunswick and himself were in, you know, some kind of disagreement, and that there is no sense redoing the material at this time just to have it sit on a shelf. "When the thing is squared away, you know, you will go back and fulfill whatever we need."

MR. BRASHICH: No further questions, your Honor.

Your witness, Mr. Newman.

CROSS-EXAMINATION

BY MR. NEWMAN:

Q Mr. Bersch, were the plastic score sheets printed by Lasky or were they printed by a subcontractor?

A They were printed by a subcontractor.

Q Who was the subcontractor, by the way?

A I am not a hundred percent sure, but I think Silcox, Miller. I would have to double-check that.

Q Silcox Mills is that?

A Silcox, Miller.

Q Where are they located?

A I believe they are in Maplewood.

Q In New Jersey?

A Right.

Q Not too far from your own premises?

A That is correct.

Q Now, when you received the assignment from Mr. Kock to print the plastic score sheets, did he tell you what they were going to be used for?

A Yes.

Q What did he tell you about them?

A That these are reflective score sheets. They are put onto a thing and they are projected on light. I think he brought us in a sample of somebody else's. He did, he brought us in a sample of some other company's plastic score sheet.

Q Do you remember whether it was a sample of the Walt Peabody Advertising Co.?

A I honestly don't remember.

Q And was it your task to follow that sample in

printing the plastic score sheets?

A Our layout was completely different than that one, but, in essence, I would say yes.

Q And did you use that sample for the thickness of the plastic?

A I don't remember. We submitted several samples because there are many different thicknesses. I can't really answer your question.

Q The sample he showed you, was it thicker or thinner than the one you finally printed?

A I don't remember.

Q There are different gauges of plastic, are there not?

A Yes.

Q What gauge of plastic would this be?

A The only way I could tell you, by looking at our estimate. I think it's 10 point.

10 point.

Q And what is this plastic made of? We call it plastic, but actually what is it?

A It's an acetate type of material.

Q And had you printed on acetate materials previously?

A We had done some work in acetate.

Q Actually, you didn't do it, it was done by a subcontractor?

A This was done by Silcox, Miller.

Q Did you have the facilities of your plant to do the printing?

A Yes.

Q But you subcontracted it out?

A Yes.

Q Did you make a profit on the subcontract?

A Yes.

Q And did you go back to your subcontractor when there was a question which arose as to the quality?

A Yes.

Q Now, in the sample that you were shown, did you observe the type of ink that was used?

A The type of ink? It's black ink.

Q Aside from color, did it have some other quality? Was it simple, ordinary printer's ink?

A It's supposedly a heat-fast type of an ink that will adhere to the back of this.

Q Why do you need a heat-fast type of ink?

A When you pour a liquid on it, or something else, a normal liquid, that you will be able to wipe it off.

Q Heat-fast, and you are talking about liquid.

What is the relationship?

A If you spill something on here you can wipe it off and the ink shouldn't run under normal conditions.

Q In the sample you were shown, did you observe that the ink was bonded to the plastic?

A The sample -- you are talking about the sample at first?

Q Yes.

A I honestly don't remember. I thought what we had tried to do was execute this the way that was done, except there were certain properties in the sample that was shown us that we were not aware of, that certain people used acid to clean these things off. That thing we were not aware of.

Therefore, we could have treated this also to stop --

Q How would you have treated the plastic sheet if something harsh were to be used in cleaning it?

MR. BRASHICH: I will object to the word "harsh." It's a characterization.

Q You used the term "acid."

A I'm not technically qualified to answer you on that, but I'm sure I can get you the answer.

If we knew what the problem was going in, we

wouldn't have had that problem going out.

Q Isn't it the fact that these sheets are projected by very powerful light?

A Yes.

Q How close to the light do they rest in use?

A I don't know. 8 inches, a foot.

Q How powerful is the light?

A I don't know.

Q Did you go and see one in actual illustration, in actual use, before you prepared the plastic sheet?

A No.

Q Did Mr. Kock tell you about how powerful the light was?

A Not to my recollection.

Q Do you know what sort of an implement was used to write on the plastic score sheet?

A Grease pencils from what I'm told.

Q Wax pencils.

And how would you normally remove grease from a plastic sheet?

A The reason these are printed on the back side here is so that the writing is done on the front side --

Q Will you answer the question, please?

How would you remove it?

A Wet cloth.

Q Ordinary water?

A Pardon?

Q Ordinary water or do you need something to dissolve the wax and the grease?

A I think ordinary water would take it off.

Q That's what you planned to do, ordinary water and cloth?

A We didn't think about that problem at that time. We didn't know it was a problem until afterwards.

Q Is the ink that is used here any different from the ordinary ink that would be used if this were made of paper rather than plastic?

A I can't answer that from a technical point. I think this is a different set ink,yes.

Q But you don't know what?

A No, I wouldn't testify to that.

Q When you say you think so, this is pure speculation on your part?

A Yes.

Q Did you attempt to try out the plastic insofar as it would be laying over a 750-watt bulb some 7 or 8 inches distant to see if it would bubble or wrinkle?

A Did we do it?

Q Did you do that?

A No.

Q You made no attempt whatsoever?

A No.

Q How long would the plastic be exposed to that heat in use, do you know?

A I wouldn't answer that.

Q Whatever information you had about the use you obtained from Kock; is that right?

A Yes.

Q And that limited information that you had is all that you got from Mr. Kock?

MR. BRASHICH: Objection, your Honor.

THE COURT: Sustained.

Q Now, you are aware that the plastic sheet is to be projected, are you not?

A Yes.

Q If it's to be projected, the image should be clear, should it not?

A Yes.

Q And if it fades the plastic is a failure, is it not? The sheet is a failure, is it not?

A I don't know the life use of these types of things. Any printing that's left outdoors or is subject

to light is going to fade in time.

Q When you say "left outdoors," what do you mean?

A Outdoors or subjected to light. If you put a painting over here and subjected it to light, it would fade.

Q I think you told us that you agree with Mr. Kock that there was a problem with respect to the plastic score sheets; is that correct?

A We agreed there was a problem based on the input that was coming back, yes.

Q Incidentally, how much is it that Mr. Kock owes you at this point?

A Pardon?

Q How much does Mr. Kock owe you for the printing at this point?

A For the printing I don't think he owes us anything. The only balance that we have left is the -- I think primarily it's packing and shipping charges.

Q Well, if I'm correct in my addition, we have three invoices comprising Plaintiff's Exhibit 77, and I add them up to $54,257.22; is that correct?

A I haven't got them in front of me.

The three invoices I saw, if that is what it adds up to, I will go along with it.

Q How much were you paid?

A We were paid everything except the last portion.

Q How much were you paid?

A You have to give me a piece of paper and I will have to figure it out.

Q I think you told us you were paid $41,200.

A In advance.

Q And were you paid anything subsequent to that?

A Yes.

Q How much have you been paid in total?

A The difference of the total there, less the last invoice of $5,000 and some-odd change.

Q Now, turning to the paper score sheets, there is a number on the paper score sheets, is there not?

A Yes, numbered in two places.

Q Were you instructed that you were to number every one of the score sheets in a consecutive fashion?

A I believe so, yes.

Q And did you attempt to number them in a consecutive fashion?

A Yes.

Q So that you began with one number, and the last of the 2 million 5, or 2 million 4, all ran consecutively;

is that correct?

A I would say so, yes.

Q Did Mr. Kock relate to you the purpose of the consecutive numbering?

A Briefly, I would say, yes.

Q And what is it that he told you?

A In other words, when a bowling alley gives out this sheet and it gives whatever number he gives to one alley, he knows what alley that is, and consecutively down the line. It's like bookkeeping.

Q Did Mr. Kock instruct you that when delivery was made of the paper score sheets that the numbers delivered to each bowling cneter had to be consecutive from pad to pad and box to box?

A No.

Q Did you attempt to do that?

A No. Every pad is consecutively numbered.

Q It was not your attempt in shipping those to have delivered to a given center a series of pads, each of which was consecutive; is that correct?

A Not to my recollection. I don't remember. Not to my recollection.

Q I think you told us that before you would extend credit to Mr. Kock you had to have a certain amount down;

is that correct?

A Yes.

Q How much was that?

A One-third.

Q And is that still your rule today?

A Yes.

Q And another amount as the work progressed before you would release it; is that correct?

A One-third at the time of proofs, and one-third COD.

Q And the balance?

A COD.

Q I see. One-third down, one-third proof, the final one-third at the time of final delivery?

A Yes.

Q So you have to be paid in full before you will release; is that correct?

A Yes.

Q Coming back to the plastics, would the cost have been greater to Mr. Kock if the plastic were of a thicker gauge?

A I would assume, yes.

Q And did you discuss with Mr. Kock at the outset plastics of different gauges or thicknesses?

A We submitted the samples.

Q And were certain of those samples thicker than the one you have before you?

A I honestly don't remember.

Q Do you recall the fact that the one that was actually chosen was the thinnest of all that you submitted?

A No, it wasn't the thinnest. We went down all the way down to 6 point. From 6 up to 14. We, being neophytes in it, didn't realize that the thickness had anything to do with it. It's more the coating than the thinness, in my opinion.

MR. NEWMAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. BRASHICH:

Q Sir, when these particular paper score sheets were printed, were they in any way bound?

A Padded 250 per pad, consecutively numbered.

Q And each one of these pads, was each number consecutive?

A Yes.

MR. BRASHICH: No further questions.

THE COURT: Anything else, Mr. Newman?

MR. NEWMAN: No questions, your Honor.

THE COURT: Thank you, Mr. Bersch.

(Witness excused)

THE COURT: All right, Mr. Brashich, are you ready to proceed?

MR. BRASHICH: Yes, your Honor. I recall Mr. Winston Kock to the stand.

W I N S T O N E. K O C K, J R., resumed.

CONTINUED DIRECT EXAMINATION

BY MR. BRASHICH:

Q Mr. Kock, I show you Plaintiff's Exhibit 69 in evidence, which is your letter of April 12, 1972, and ask you whether you have received a reply to that letter in writing from anyone at Brunswick.

A No, I did not.

Q And --

MR. NEWMAN: Mr. Brashich, that's'73, not'72, as you stated.

MR. BRASHICH: 69.

MR. NEWMAN: Not the exhibit number, the year. I think you said 1972, and of course you meant 1973.

MR. BRASHICH: 1973.

Q And did you write to Brunswick on April 9, 1973?

A I did so, yes.

Q And did you have any conversations with Mr. Oles

by telephone subsequent to April 9, 1973?

A Yes, I did.

Q Could you tell us what date or when those particular conversations took place?

A Within a matter of just a few days, I'm sure, because -- within a matter of a few days.

Q And that would be sometime in the middle of April 1973; is that not a fact, sir?

A April 10th, 12th, 13th, yes.

Q And could you tell me what you said to Mr. Oles and what Mr. Oles said to you during those specific conversations in the middle of April 1973?

A There were one or two conversations.

Q Tell us the first conversation, Mr. Kock.

A I called Jerry and said to him, "What has happened with the solution that you promised to give me?"

He said that they were still discussing the problem. They realized that I was in a bad situation. They had not yet resolved how they would try to help me. They would have more conversations and more meetings.

Q And did there come a time -- that was the end of the conversation?

A I believe that we also talked about these plastic score sheets, make goods for them.

Q What did you say to Mr. Oles and what did he say to you?

A I asked him if he knew any more about plastic score sheets, in specific the ones in Ridglea, Texas, which I had mailed him weeks before, which I assumed were still in use --

MR. NEWMAN: I rise, and I am sorry to interrupt the witness, but if there is to be testimony of the kind that I arose with respect to before, that is, testimony that is going to repeat conversations of third parties other than Mr. Kock, then I would ask your Honor to instruct the witness that that is not admissible testimony. I fear it may be forthcoming.

THE COURT: I assume he has learned by now he is not supposed to tell other than what he knows directly.

If there is any such, you may move to strike it out.

Q I again ask you what did you say to Mr. Oles and what did Mr. Oles say to you relative to these plastic score sheets, and just confine yourself to what you know and not to what somebody else told you.

A He said he still had no answer for me on my advertising problem; that they would have another meeting on it; and could I please call him back in a couple of days.

Q And did there come a time that you in fact did call Mr. Oles?

A Yes, I did call him.

Q And what did Mr. Oles say to you during that particular conversation, and what did you say to Mr. Oles during that conversation?

A This is tough.

THE WITNESS: Can I ask something, your Honor?

THE COURT: Deal with your attorney.

Q Mr. Kock --

A I knew what he said to me, but he said something somebody else said. I don't know if I can say to that.

Q What did he say to you during that subsequent conversation?

THE COURT: He says he has a problem because it includes something somebody else told him.

MR. BRASHICH: May we approach the side bar, your Honor?

THE COURT: Yes.

(At the side bar)

MR. BRASHICH: I think what the testimony is going to be, your Honor, is that Mr. Oles reported to Mr. Kock that Mr. Rudo had decided that this was his

own problem, that he would have to live with it himself.

THE COURT: Whose own problem?

MR. BRASHICH: Mr. Kock's problem. That was the decision of the company.

MR. NEWMAN: I object to something like that, your Honor. He is not saying that Oles made that decision. He is reporting a conversation.

THE COURT: Yes, but I think that's allowable, even for the fact that Rudo said it, because Oles has to presumably guide himself by what Rudo said or what he perceived Rudo to have said.

I will allow it.

(In open court)

MR. BRASHICH: I withdraw the last question and I will ask this:

Q During that conversation with Mr. Oles, what did he say to you and what did you say to him?

A I said to him had he arrived at any solution on the advertisers.

He said that they had a meeting, they had discussed the use of my score sheets in other bowling centers than Brunswick.

I said I didn't think that would work.

He said he didn't think it would, either; that

that they had really decided that they would do nothing. They would not help me. It was my problem; I had to take care of it on my own.

I said that this placed me in a very difficult position because I had borrowed money, I had taken the advertisers' money and I had paid the printer; that I did not have exposure, I did not have money to pay back to the advertisers and in fact I did not have a business.

He said that he could do nothing more, that Bernie Rudo and the people he had talked with had said, "Win Kock gets nothing from us."

I then said that I would have to take this up with my lawyer because I felt that I had to have some of my rights protected, and that was the last conversation.

Q And did you have a subsequent conversation with Mr. Oles?

A Yes, I had one last conversation.

Q And can you possibly pinpoint that particular date, Mr. Kock?

A It would have been toward the end, almost the end of April.

Q And what did you say to him and what did he say to you?

A I called him to thank him -- and said thank

you to him for being understanding of my problem, that I wanted to tell him that I was suing Brunswick, that I had to sue Brunswick, that I was in a bad position. I wanted him to know there was no animosity between he and myself because I understood that he was trying to solve the problem for me.

He said he understood that I had to do whatever I had to do, and he would have to do whatever Brunswick had to do, and that was the end of the conversation.

Q Was this conversation that you just now related prior to your receipt of the May 2nd letter from Mr. Oles?

A Yes, it was.

Q And if you recall --

MR. NEWMAN: The exhibit number of the May 2nd letter is what?

MR. BRASHICH: 32.

Q If you recall, when in fact did you receive Exhibit 32 in evidence? Was it May 2nd or was it some day subsequent to that?

A It must have been after May 2nd, subsequent to.

Q And do you recall when you authorized your attorneys to commence this suit?

A That would have been the middle of -- maybe

the beginning of the third week of April. Middle of.

Q And I show you this document and ask you whether you have seen that particular document or a facsimile of that document before this date?

A Yes, I have.

Q And does --

MR. BRASHICH: Your Honor --

MR. NEWMAN: It's the complaint.

MR. BRASHICH: The only reason I am offering this is for the date stamp that appears thereon.

THE COURT: It's part of the Court's records. You can offer it for anything. Read the date.

MR. BRASHICH: Filed United States District Court, May 2, 12:52 p.m., 1973, Southern District of New York.

Q Now, do you recall, Mr. Kock, that you received a copy of a letter dated January 5, 1973, from Mr. Kratzenberg?

A Yes, I received such a letter.

Q And do you recall to whom the original of that copy was sent, sir?

A To a Mr. Ray Hehman at Carter Wallace, who was the product manager of Active Tooth Paste -- Tooth Polish.

Q I show you Plaintiff's Exhibit 84 and ask you if you have ever seen this particular document.

A Yes, I have.

Q Did you in fact receive that document sometime after February 7, 1973?

A Yes, I did.

Q And from whom did you receive it, if you know?

A From Mr. Ray Hehman, product manager, Carter Products.

Q That particular letter relates to what advertising on your score sheet?

A This is his confirmation of the Active Tooth Polish to be included on the National Advertising score sheet.

Q And, in fact, when you had these score sheets printed, was an advertisement from Active thereon?

A Yes, it was.

MR. NEWMAN: There is no dispute that there is advertising for Active thereon. I have no objection to the letter. I don't see the point, though.

MR. BRASHICH: I offer this into evidence as Plaintiff's Exhibit 84.

(Plaintiff's Exhibit No. 84 was received into evidence.)

xx

Q Now, Mr. Kock, do you know who Hartwell Enterprises, Inc. are?

A Yes, I do.

Q And do you know where they are located, sir?

A I think -- I believe they are in New Jersey.

Q When was the first time that you spoke to anyone at Hartwell, if you recall?

A Oh, we had several conversations; November, December, January.

Q And did there come a time that you received Plaintiff's Exhibit 82?

A Yes.

Q And could you tell us when you received this particular exhibit?

A January 10, 1973.

Q And, Mr. Kock, did Hartwell Enterprises, Inc., have anything to do with these score sheets?

A Yes, they did.

Q And did they have anything to do with any one of the advertisements that appear on these score sheets?

A The coupon return, the scissors, and the football game.

Q And when you printed these score sheets, did in fact such advertisements appear?

A They did.

MR.BRASHICH: I offer Plaintiff's Exhibit 82 in evidence.

MR. NEWMAN: I object to the letter and I would like to approach the side bar.

THE COURT: All right.

(At the side bar)

MR. NEWMAN: This letter contains projections, references to conversations that Mr. Hartwell, or whoever the author was, had with another person about the profitability that is going to enure to Mr. Kock, based upon this advertisement. I think it's objectionable as can be. It's clearly hearsay.

(Pause)

THE COURT: Yes. Sustained.

(In open court)

MR. BRASHICH: Your Honor, may we have a short recess?

THE COURT: Yes.

Take ten minutes, ladies and gentlemen.

(Recess)

(In open court; jury present)

MR. BRASHICH: May I proceed, your Honor?

THE COURT: Yes.

MR. BRASHICH: With your leave, I would like to read Exhibit 84 in evidence to the jury.

(Mr. Brashich reads Plaintiff's Exhibit No. 84 in evidence to the jury.)

Q Now, Mr. Kock, you had a number of conversations with Mr. Oles during the month of March and during the month of April, and during those conversations during the months of March and April was there any mention by Mr. Oles relative to sequential numbering?

A No, there was not.

Q When was the first time that sequential numbering was brought to your attention?

A That would have been in that May 2nd letter which came May 3rd, 4th.

Q Mr. Kock, at the time that you were running this particular business, did you maintain a cash book or some book of account?

A Yes, I did.

Q Now, I show you a portion of Plaintiff's Exhibit 35 and ask you whether or not that particular book is the cash book which you referred to?

A Yes, it is.

Q Now, Mr. Kock, do you know how much money you spent for printing of this particular project?

A The exact number, I would have to take a look.

Q Do you have any records presently in your possession which might refresh your recollection as to the amount of money that you spent for printing in this particular venture?

A Yes.

MR. NEWMAN: I object, your Honor. I think we had that evidence this morning from Mr. Bersch, who was the printer.

MR. BRASHICH: May we approach the side bar, your Honor?

THE COURT: No. I will allow it. I will overrule that particular objection.

MR. BRASHICH: Thank you, your Honor.

Q Could you look at whatever records that you have and refresh your recollection as to solely the printing charges that you incurred?

MR. NEWMAN: Your Honor, please, I don't think that we have proper evidence. This is a book maintained by Mr. Kock himself. These are not invoices, these are not evidence of charges; just as he shows the invoices that were prepared by Lasky.

THE COURT: You may cross-examine about it.

First, I don't know, does that refresh your

recollection?

Q Have you looked at the book, Mr. Kock?

A Yes.

Q Is there any reference in that book relative to printing?

A Yes, there is.

Q Could you tell me how much money you spent in printing in this particular venture?

A If I can look at the book, yes.

Q I'm asking you to look at the book right now. Read it.

A Printing spent --

Q Just read it to yourself, Mr. Kock.

Have you read it?

A Yes.

Q Now, could you tell me after refreshing your recollection how much money did you spent for printing on this project?

A $47,188.96.

Q I show you a series of invoices and receipted checks, and I would like you to go through each and every one of those, sir.

THE COURT: Wait a second. I'm not sure I would like him to do that. What is he going to do after he has

done that?

MR. BRASHICH: Your Honor, I made an offer of proof that those particular invoices and cancelled checks specifically refer to the cash book entries and are the sums that he expended for printing.

THE COURT: All right.

Will you see if that's true?

THE WITNESS: It's true, yes.

THE COURT: Have you been through them before now?

MR. BRASHICH: Yes, your Honor.

THE WITNESS: Yes.

THE COURT: All right.

Q Those are the invoices and cancelled checks that you have had relative to printing?

A Yes, they are.

Q Now, during the particular time that you were in business, did you travel to sell advertisements to other individuals?

MR. NEWMAN: Your Honor, I object to periods of time. Mr. Kock was in business apparently since 1971, according to his testimony. He did not make a contract, the contract that is sued on in the complaint, until November 27, 1972. I would object to any testimony with

respect to expenses that precede November 27, 1972.

MR. BRASHICH: Your Honor, the pretrial order is such that the agreement upon which we rely occurred sometime after the August 19 --

THE COURT: A pretrial order is evidence. The objection relates to the nature of the evidence that is before us right now, and you have to respond to that.

MR. BRASHICH: But I was given to understand, your Honor, that the pleadings were amended by the pretrial order.

THE COURT: I understand, Mr. Brashich, but Mr. Newman, if I understand him, is saying that the only foundation for a showing of the contract in the record now before us relates to a contract made late in November.

MR. BRASHICH: Yes, your Honor, but we believe that we have established that by the telegram in August where Mr. Kock firmly committed himself to Brunswick to supply them for 1973.

MR. NEWMAN: That was followed by Brunswick's letter of October 10th which says that we assume that you have discontinued your interest.

THE COURT: Come up to the bench.

(At the side bar)

MR. NEWMAN: I don't see anything in the pretrial

order.

THE COURT: Whether it's in the pretrial order or not, let me ask you this:

If a party makes expenditures in anticipation of a contract and he gets the contract and it's part of what he puts into the contract enterprises, is it the law that he is precluded from claiming that as part of his loss, even though had he not gotten the contract he would have no right of recovery?

MR. NEWMAN: I don't know on what theory they are basing any claim for out-of-pocket. If the theory, and I think it has to be the theory, is that they relied on something we did, then we certainly didn't do anything in the way of a contract on which they could rely before November 27th.

So I would answer your Honor that I don't agree that that is the law.

THE COURT: I think that is right. I have stated it as favorably to you as I can, but I don't think you can recover for expenditures before you have a contract.

It seems to me you don't have a contract before November 27th.

MR. BRASHICH: Then it's the Court's ruling that the August 10th confirmation by telegram and commitment

by Kock cn in no way be considered as an acceptance of an offer that Brunswick made.

THE COURT: No, that's right, that's my ruling. I don't think there is any contract back in August.

What are we talking about? How much money is involved between August and November?

MR. BRASHICH: Most of the expenses were incurred at that time. We are talking about $35,000.

THE COURT: For what?

MR. BRASHICH: Soliciting advertising, going out and speaking to the Army. On November 15th, on reliance of this agreement, he obtained the United States Army firm commitment.

THE COURT: How did he travel about, in a private railway car?

MR. BRASHICH: No, your Honor. It's $150 here, $175 here, $25 to take out someone to lunch from an advertising agency.

Sales are extremely expensive.

THE COURT: You are dealing with Brunswick Corporation and you have made claims that they are too big and they have a table of organization, and I think you are stuck with that, too. You don't have a contract with Brunswick Corporation until you have a contract with them,

and I don't see anything in this evidence that I could call a contract before November 27th.

Now, exactly what do you see that you say is a contract? Show it to me.

MR. BRASHICH: I can't see --

THE COURT: I'm looking at your Exhibit 56.

MR. BRASHICH: And 55, which is the confirming letter to that telegram.

THE COURT: These are only from Kock to Brunswick.

Now, what did Brunswick do to make an agreement?

MR. BRASHICH: They called Kock, if you recall, your Honor, on August 10th, and asked him whether or not he was willing to firmly commit himself. Mr. Kratzenberg called him.

I would call as an adverse witness under 43-b at this juncture Mr. Kratzenberg, and elicit that testimony from one of his own people that he did call and that he did receive that document and this document.

MR. NEWMAN: I think you are overstating it. You can't help but look at the October 12th letter, on which you rely in your pleadings and the pleading --

THE COURT: Show me where the pretrial order says it, that you had a contract before November.

(Pause)

MR. BRASHICH: I allege that they did have a contract --

MR. NEWMAN: That's your contention.

What paragraph is that?

MR. BRASHICH: Paragraph 3-B(1).

-- that we did have an agreement for that particular period of time. The two documents which speak here for themselves are in response to an offer by Brunswick to Kock which he accepted, and thereafter made commitments.

And the next thing that we have is a letter from Kratzenberg.

In the testimony we said, "Have you abandoned this agreement?"

THE COURT: Have you abandoned this agreement?

MR. BRASHICH: Yes.

THE COURT: Let's see it.

MR. NEWMAN: That's October 10th. Bring October 12th also.

(Pause)

MR.BRASHICH: On October 10th,Kratzenberg writes and says, "Are you abandoning or planning to go ahead?"

THE COURT: It's not an agreement; it's a

proposed program.

MR. BRASHICH: Then Kock writes a letter to Kratzenberg and he says, "I'm puzzled. I'm definitely going ahead."

THE COURT: I understand that.

No, I can't hold that there is an agreement. He has a more definite agreement coming. His lawyer is working on a rough draft. I can't hold Brunswick to that on the basis of materials like that.

I sustain the objection.

MR. BRASHICH: Exception, your Honor.

(In open court)

THE COURT: Since we have kept the jury waiting, let me risk a tentative explanation of what we were talking about and why you have been kept waiting.

I am probably going to rule that if there was an agreement, as both sides seem to recognize, the agreement takes binding form toward the end of November 1972. I think it's November 27th.

MR. BRASHICH: Yes, your Honor.

THE COURT: Our discussion just related to efforts by the plaintiff, Mr. Kock, to offer testimony about expenditures he made in as early as August of 1972 and prior to November 27, 1972 in traveling and in other ways

to acquire contracts for advertising on these score sheets.

Now, I might also say that the offer of proof, the evidence that Mr. Kock wished to present, I am informed by counsel might have involved substantial amounts of money spent in that way.

However, I have concluded that that particular evidence about monies a party spends in the belief or hope or expectation that he will have an agreement cannot in itself be part of any claim for damages for related breach, if there was a breach, of the agreement.

On the other hand, I think in fairness that this subject may wash out in the end, because I think that proper instructions to the jury will include as an item of damages,if there are any damages, if there was a breach, amounts that the plaintiff, who claims there was a breach, was entitled to expect to be receiving from advertisers or others if the contract had been fulfilled, contrary to his claim that it was actually broken.

Now, to the extent that the plaintiff can prove, and I don't know whether he will prove this or not, but to the extent that he can prove that it was more probable than not that he would receive X, Y or Z amount of dollars from Carter Wallace or Bergdorf Goodman or anybody, it's

probable, if and when we reach this point, that I will allow the jury to consider such expected receipts, provided he proves them by a preponderance of the evidence to your satisfaction,as part of his claim for damages.

It may be that in that way, and in what I think is a more fair business sense, he can claim that recovery through what would have been, on his contention, the performance of the contract.

Nevertheless, having through that out aloud on everybody's time, I am going to stick to the ruling and not let any proof into this record of these asserted expenditures prior to late November 1972.

MR. BRASHICH: Your Honor, I will have a problem. I had not anticipated this, frankly. I will have a problem with my offer of proof and further proof in this matter inasmuch as I have segregated them all together. To unsegrate them as of a specific date will take me some time.

THE COURT: Well, is that all you have left of your examination of Mr. Kock?

MR. BRASHICH: No, your Honor.

After I complete the actual expenditures, as your Honor has ruled, after November of 1972, I will have proof adduced as to potential advertisers subsequent to the first

six-month period and the expectations and the calculations of Mr. Kock in May at the time --

THE COURT: Why don't you go to that and then you can use the lunch recess to organize your materials on the subject?

BY MR. BRASHICH:

Q Mr. Kock, were you paid for advertising on the score sheets by Carter PD, Inc.?

A Yes, I was.

Q Were you paid for advertising on the score sheets by Rumrell Hoyt, Inc.?

A Yes, I was.

Q Were you paid by the United States Army through N. W. Ayer & Sons for advertising on the score sheets?

A Yes, I was.

Q And were you paid by Chelsea Milling Co. for advertising on the score sheets?

A Yes, I was.

Q Did you receive checks from these particular companies for this advertising?

A I did.

Q And when you received checks did you make photocopies of these checks?

A I did.

Q And did you keep these photocopies of these checks?

A Yes, I did.

Q I show you Plaintiff's Exhibits 89, 88, 91 and 90, and ask you whether in fact these are the photocopies of checks that you made from the various advertisers that I have mentioned.

A Yes, they are.

(Pause)

MR. NEWMAN: I have no objection.

MR. BRASHICH: Your Honor, at this present time I would offer these.

xx (Plaintiff's Exhibits Nos. 88, 89, 90 and 91 were received in evidence.)

Q Mr. Kock, I show you Plaintiff's Exhibit 90 in evidence and ask you how much did the United States Army pay you for this advertising?

MR. NEWMAN: It was the advertising agency.

Q N. W. Ayer & Sons, Inc. --

MR. BRASHICH: Withdraw that question.

Q Is N. W. Ayer & Company an advertising agency in Philadelphia?

A Yes, they are.

Q If you know, sir, does N. W. Ayer & Company

represent the United States Army?

A Yes, it does.

MR. NEWMAN: I didn't mean to lead you into any long testimony. I have no objection if Mr. Kock will tell the jury each check and the amount and the advertising that it relates to. I think that's sim[illegible] I'm sorry.

THE WITNESS: There is real[illegible]ger amount the Army paid than this. They paid me.

Q How much did you receive from N. W. Ayer for this advertising?

A $15,000.

Q I show you Plaintiff's Exhibit 88 and ask you to what advertising does that refer?

A Carter Wallace, Active Tooth Polish, $12,200.

Q And I show you Plaintiff's Exhibit 89 and ask you to what advertising does this relate, and how much did you get paid for it?

A Rumrell Hoyt Advertising Agency, Desenex Product, $11,562.50.

Q And I show you Plaintiff's Exhibit No. 91 and ask you the same question. How much money did you receive and with regard to what?

A Chelsea Milling Company, Jiffy Mix, $1,000.

Q Now, what was your arrangement with Jiffy Mix

or Chelsea Milling Company?

MR. NEWMAN: If your Honor please, I think he has introduced the document setting forth the arrangement with Jiffy Mix.

Isn't that one of your exhibits?

MR. BRASHICH: It is not.

MR. NEWMAN: I object to the conversation.

MR. BRASHICH: I am not asking for a conversation.

MR. NEWMAN: I object to the conclusion.

THE COURT: How does the arrangement come to exist? Is it the result of a written agreement, an oral agreement?

MR. BRASHICH: I will just double-check it.

MR. NEWMAN: Are you looking for Exhibit 81, Mr. Brashich?

MR. BRASHICH: Yes, I am. I think that is the number.

(Pause)

THE COURT: Is that an exhibit in evidence?

MR. NEWMAN: No, it is not, your Honor. This is identified in the pretrial order.

(Pause)

MR. BRASHICH: I cannot find Exhibit 81, your Honor.

THE COURT: Look, I think you are going to have to go on to something else, Mr. Brashich. You may get back to it after lunch. Let's proceed, please.

Q Did you receive any payment from any other advertisers except those that you have testified to?

A Yes.

Q And could you tell the jury what other payments you received for what other advertising?

A The direct mail advertiser did pay some money.

Q And do you have any records which would indicate how much money he paid you?

A I think there are some. I'm not sure.

Q Do you recall roughly how much money he paid you?

A It was only $700 at that time.

Q And did Baskin-Robbins pay you any money, the ice cream people?

A No, they did not.

Q Did there come a time in May of 1973 that you received a letter from them?

A Yes, I did.

Q I show you Plaintiff's 93 and ask you whether this is the letter you received in May of 1973?

MR. NEWMAN: I am going to object. I assume he

will say yes.

A Yes, it is.

MR. BRASHICH: I will offer it into evidence.

MR. NEWMAN: I object.

THE COURT: On what ground?

MR. NEWMAN: On the ground it has not been established. There is no authenticity to this letter. It's on the letterhead of a company. It bears a name. I don't see how this is otherwise admissible.

THE COURT: I guess you have not laid a foundation for it, Mr. Brasnich, so at this time the objection is sustained.

MR. BRASHICH: Thank you, your Honor.

Q Prior to May 1973 did you have conversations with someone or people working at Baskin-Robbins Ice Cream? Just yes or no.

A Yes, I did.

Q And subsequent to that date did there come a time that you received a letter from Baskin-Robbins Ice Cream?

A Yes, I did.

Q Do you recall when that was, Mr. Kock?

A December or early January, I would assume.

Q Do you recall the name of the person you spoke

to at Baskin-Robbins?

MR. NEWMAN: Your Honor, I will object to testimony about conversations.

MR. BRASHICH: I am just asking does he recall.

THE COURT: Don't interrupt. Let me hear the objection.

MR. NEWMAN: I don't believe there has been sufficient foundation laid for the conversation itself. We have a statement that he had some conversations with someone at Baskin-Robbins. For all we know, this was a telephone conversation. For all we know there is no identification of the individual.

Without a proper foundation as to how this conversation came about and how we know who he spoke to, I believe it's completely objectionable.

THE COURT: Well, Mr. Brashich, when you get through looking through those piles of paper, you ought to try and lay a proper foundation for your question.

The objection is sustained.

(Pause)

THE COURT: I am going to give the jury a recess for lunch until 2:15. Please take lunch and come back at 2:15.

(The jury left the courtroom.)

THE COURT: Now, Mr. Brashich, I want the record to show that the reason for this long lunch recess is that the jury and I have spent an intolerable amount of time during the last thirty or forty minutes sitting here while you riffled through various piles of paper.

I want to tell you there are many judges in this building and in this city, and they would probably be right, who would have your direct examination terminated at this moment. I do not wish to do that. I want Mr. Kock's case decided on the merits.

I want you prepared to run this case without any further abuse of the Court's time or the jury's time when we come back at 2:15. Get your papers in order and proceed with the questioning so that we don't have to wait ten minutes while you hunt about for papers. You have that obligation to everybody in the courtroom and I expect you to fulfill it.

2:15.

MR. BRASHICH: Yes, your Honor.

(Luncheon recess)

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AFTERNOON SESSION

2:15 P.M.

(In open court, jury not present.)

THE COURT: Let me think aloud with counsel for a second about the ruling before lunch on this problem of expenditures prior to November 27th. I think the ruling is wrong but I think I will share with counsel the blame for this error. I think we may be suffering a certain confusion for this reason: The plaintiff's requests in proposing a measure of damages asks for expenditures plus expected profits from this contract. Is that a fair statement, Mr. Brashich?

MR. BRASHICH: Yes, sir.

THE COURT: I don't think that would ever have been the measure of the plaintiff's benefit if the contract had not been breached.

Let me explain what I mean and see if I understand this correctly. As I understand it, Brunswick never agreed to pay him anything.

MR. BRASHICH: That's correct, sir.

THE COURT: He was to realize his return from these payments from advertisers. So at best Brunswick wasn't going to pay him in reimbursement for printer's expenses, and so on. He was going to get a sum from his

advertisers that he hoped and believed would be so great that he would recover back what he paid Lasky and what he paid for travel, and so on and so forth, plus a handsome profit. But you in this lawsuit are asking for both. You put in your invoices from Lasky and your payments to Lasky and you put in your evidence of other expenditures and you say give us those and give us what, expected profit?

It seems to me that we have to put it to the jury in some way that will make it clear to them that they can't let you recover twice, and it seems to me that is part of what has caused me trouble and led to that unsatisfactory explanation, as I now deem it, that I gave to the jury before lunch; that is to say, and here is what I am groping at, if there is a breach and if the plaintiff can prove the anticipated returns he would have realized on his contract-- by the way, is it a year that we are talking about?

MR. BRASHICH: One year, sir.

THE COURT: If he can prove sufficient certainty so that a jury could find by a preponderance of the evidence that he would have realized $300,000 gross on this and he didn't get it, then maybe they can give him $300,000.

If he can't prove that with sufficient certainty, then -- again assuming they have found a breach -- maybe

he should have his out-of-pocket expenditures plus some allowance for the investment of his time.

But what I am now saying to you, Mr. Brashich, and having been wrong once I am not prepared to be absolutely confident that I am right this time, is that I think you are going to have to put together a formulation of your damage theory in some such alternative condition so that the jury will understand that they can't be paying Mr. Kock twice for any of these elements of his claim.

Now, I will hear you on that before we have the jury in, if you want to say anything about it.

MR. BRASHICH: This has been one of the problems that I have been facing in this lawsuit, and frankly, your Honor, I don't know which way to go. I have read the law and most often I believe the holdings of the courts have been that prospective profits in a new venture will be disallowed by the court.

We had a theory that since this was an ongoing business that Mr. Kock was taking over from Walt Peabody that we could perhaps ascribe some sort of a dollar value to that previous business that Mr. Peabody had. I had thought that during our pre-trial meetings, your Honor, that the court did not see eye to eye with this particular theory. And frankly, I was under the impression that this

would not be allowed to go to the jury.

THE COURT: I'm not going to rely on the Walt Peabody situation because I think yours is, on your own evidence, a quite different arrangement. I don't see why you should have even thought you should rely on Walt Peabody. He is dealing with local advertisers. He is an old established enterprise and you are a new operation engaged in a new approach to this matter. I don't see that Walt Peabody is any comfort to you. But I never said that I would not allow you to attempt to show a factual basis for lost profits, and I am not saying that now.

I don't think this is a matter of very rigid law. I think it is a matter of looking at the particular case and seeing whether there is enough evidence on which a jury of reasonable people should be allowed realistically to make projections that are not guesswork, always assuming there is a breach of contract.

Before lunch you put in a number of payments from advertisers, you have evidence that your man is experienced in the advertising industry. I am not prepared to say at this point that he could not make a projection that I would forbid the jury to look at. There are too many negatives in that but you understand what I mean.

MR. BRASHICH: I think I do, your Honor.

THE COURT: So you misunderstood and I don't take any blame for your misunderstanding. My precluding you on Walt Peabody did not mean that you could not claim lost prospective income or profits or whatever you want to call it.

Now, it is all right for me to go back and forth because I am a judge but you can't keep going back and forth. You have trouble and you tell me that you have trouble making up your mind elicits my sympathy but it doesn't complete your work. Now you are going to have to come down hard and put together a theory of damages that you and I can live with, whether or not the defendant can live with it.

On the other hand I haven't heard from you, Mr. Newman, and I think I ought to hear from you on any comments or criticisms on the reformulated approach I have suggested.

MR. NEWMAN: I think Mr. Brashich has posed a dilemma to the defendant which can't be resolved unless he himself resolves which way he thinks he should go.

On the one hand, if he shows a great number of expenditures, this applies to the lack of profitability of the business. If your Honor were to permit the question of lost profits to go to the jury, then the expenses also have to be submitted to the jury.

But if the plaintiff is going on a theory that says I don't want anticipated profits but rather I want Brunswick cost me out-of-pocket by the breach, then under those circumstances I think the expenditures which have to be limited. We are placed in an insoluble dilemma because the plaintiff wants to have it both ways and I think the solution to that dilemma is that he be required to elect.

THE COURT: I don't know that he is required to elect because we are conversing. His dilemma is not insoluble because I am going to solve it at this level and on the 17th floor eventually it will get finally solved. So you must not despair. We will have a solution. I invited you to speak in the brief that perhaps you would contribute to the solution. For you to say simply that it is insoluble doesn't help very much. What do you think is the correct measure of damages and why? That may help guide the plaintiff and the court.

MR. NEWMAN: My view is that it is going to be difficult for him to show a loss of profit. I think, as your Honor correctly pointed out, Brunswick was under no obligation to pay anything to Mr. Kook, and all that he really could look for from Brunswick's fulfillment of the contract, as he views it in this litigation,

is that he would have made money.

If your Honor will rule to that effect, then I think we can know where we stand on the question of whether prior expenditures are admissible.

THE COURT: I am going to rule that on the record as I now understand it, on a little bit of law that I have quickly read since coming back from lunch, the evidence is sufficient at this time so that the plaintiff may proceed on these alternative theories, and if it doesn't change markedly before the end of the trial I will put the alternative theories to the jury under appropriate instructions which Mr. Brashich better draft in the wee hours of night or thereabouts so that I can look at them and the defendant can look at them and we can make a judgment, and those proposed instructions ought to be concrete and particular; that is, on the alternative of actual expenditures plus some compensation for the investment of time and effort and talent. I would like numbers in there.

On the alternative that remains, the alternative of lost income from advertisers, which could be put to the jury as a gross amount since it is an alternative, I would again want the plaintiff to formulate his theory with as much precision as the expected evidence will allow.

Do you understand me, Mr. Brashich?

MR. BRASHICH: The only -- could I ask the court for a definitiion, in the second alternative on prospective profits, what the gross amount of the revenue--

THE COURT: I didn't say profits. I said revenue or income.

Look, if you expected reasonably that over the course of this year for having their names on two and a half million printed papers and on plastics -- were the names going to be on the plastic, too?

MR. BRASHICH: They are.

THE COURT: If you could show the jury or argue to the jury that you reasonably expected with the scissors and the footballs and the premiums and the flat payments that you would receive a gross amount of, let us say, $200,000; if the evidence permits that plausibly -- and I can't say now. I am just telling you where perhaps we are heading -- if the evidence permits that I will let you put to the jury that 200,000 as one alternative in lieu of the other alternative which would be the total of payments to Lasky and expenses for solicitation and whatever else you have, plus I would think a reasonable amount for the knowable and foreseeable known investment of time, energy and talent by the plaintiff himself in his side of the bargain.

If I may inquire of the court, your Honor, when when you are speaking about the out-of-pocket et cetera, are we still using the cutoff date of December 1st or November 27th?

THE COURT: No, we are not. I told you, I decided I was wrong before lunch and I apologize to you. I made you sort out your papers. I am going to let you put it all in on that alternative. So, unsort your papers.

I will explain to the jury that it is my fault, for such comfort as that gives you.

MR. BRASHICH: Could I ask my opposing counsel what I did during lunch was segregate only November 27th to May 2nd any expense which is vouchered, and we have segregated those in Exhibit 35. I have just pulled out and culled out all the various charge slips that he had for the period August to November 27th. There are also some earlier chits. Will opposing counsel allow me to put that into evidence and really use -- and we will keep it from the jury but just use the direct testimony of Mr. Kock from these cash book records.

MR. NEWMAN: I am not sure I understand. Do you want to submit evidence of expenditures or amounts of expenditures prior to August?

MR. BRASHICH: No, I don't. I am taking it

your ruling as changed is from August 10th on, nothing prior to August.

THE COURT: I assume you yourself even weren't attempting that.

MR. BRASHICH: No, I was not.

What I have is only the evidence from December 1st to May 2nd. I have here all the evidence from August 10th to November 27th. There are also some earlier matters which have been mixed in. I know the court is trying to get this trial finished but it would take me quite some time to put them back into their own categories.

I am asking will my opposing counsel concede that the cash book records will reflect whatever items that are here.

MR. NEWMAN: Are you proposing to put the cash book in in its entirety because that has expenditures that go back to 1971.

THE COURT: He is going to have the plaintiff read from the cash book; is that right?

MR. BRASHICH: That's correct.

THE COURT: Then he is going to give you those underlying checks and vouchers overnight, I assume, so that you can check for purposes of cross-examination. It seems fair to me.

MR. NEWMAN: I would have no objection to that method of procedure. I still believe your Honor is incorrect in permitting the damages.

THE COURT: I understand but having made that error as of now and being committed as of now I ask you if you will go along with his procedure.

MR. NEWMAN: I have no objection to the procedure.

MR. BRASHICH: My client advises me -- what we did over lunch, your Honor, was total expenditures from December 1st through May 2nd. The cash book does not have a total for the prior period August 10th to December 1st. I think in about five minutes I will be able to do that so he will be able to give totals to the jury rather than meaning less numbers.

THE COURT: Is that agreeable with you, Mr. Newman?

MR. NEWMAN: That would be agreeable, as far as procedure.

THE COURT: Look, Mr. Brashich, Mr. Newman is now in the happy or unhappy position of disagreeing with both of us. Let us be clear that I have not joined the team of counsel for the plaintiff. I have told you where I stand at this moment, and you asked me questions about where I stand. I don't vouch to you that it is correct. So if overnight you don't want to be stuck with this position,

please have in mind that you represent the plaintiff and I want you to argue against it insofar as you think it may be erroneous and even too favorable to you, you have the obligation to your client and even me to protect your own record.

This is where I am at the moment. It seems to me those alternative measures of damages are fair in light of what I understand this case to be about. If overnight you have a different view please plan to tell me about it.

MR. BRASHICH: Yes, sir.

(Recess)

THE COURT: Are we ready?

MR. BRASHICH: Yes, your Honor.

THE COURT: I haven't thought of anything else but if I do I will tell you.

(Jury present)

THE COURT: Let me tell you now, ladies and gentlemen, that some substantial part of the delay since you got back from lunch is attributable to me. On the question of that evidence problem that I told you about before lunch. In the course of lunch I decided that the ruling I made this morning was probably incorrect and I am changing it. That means that the evidence of expenditures that Mr. Kock wanted to prove for the period before

November 27, 1972, I will allow to be placed before you.

Eventually I think the alternative theories that I was roughly outlining to you are likely to be the alternatives that you will have to consider when the case is placed before you for decision; that is, the damages, if there are any -- of course you only reach the question of damages if you find the contract was broken. But the damages, if there are any, will have to be measured in either of two ways and not both. They will either be lost receipts or the recovery of expenditures and compensation for invested time, and so on. As I say, not both.

Now, that question I think, I hope will be formulated for you with some more precision when the case does come to be given to you for your decision in the instructions that will be in better shape, I trust, by then than they are now.

I tell you that in order to hear the case without any undue delay we are going to put the evidence before you now which will be sufficient to cover either of the alternatives and then remind you of it and let you consider it insofar as it is pertinent under the instructions that I will give you. So all of this, I hope, will become a little clearer, a little more intelligible for you by the time the case is given over to you for your deliberations.

With that I think we are ready to proceed, Mr. Brashich.

MR. BRASHICH: Thank you, your Honor.

W I N S T O N E. K O C K, Jr., resumed.

DIRECT EXAMINATION CONTINUED

BY MR. BRASHICH:

Q Did there come a time when you spoke by telephone to someone representing himself or herself to be an employee of Baskin-Robbins?

A Yes, there did.

Q Could you tell us and the jury what date that was?

A That would have been some time right after the new year's, first week of January.

Q And subsequent to that date did you write to Baskin-Robbins?

A Yes, yes, I did.

Q What, if you recall, did you send them?

A The proposal for the advertising, the sales kit for the bowling score sheet.

Q Did there come a time that you had a reply to your communication?

A Yes, there did.

Q And, Mr. Kock, I show you Plaintiff's Exhibit 80 and ask you if in fact this is the reply that you received.

A Yes, it is.

MR. BRASHICH: I offer this into evidence as Plaintiff's Exhibit 80.

MR. NEWMAN: I have no objection.

xx (Plaintiff's Exhibit 80 received in evidence.)

Q In the letter or the wrapper that you received this letter in, was there anything else enclosed?

A Yes, there was.

Q And could you tell us what that was, please?

A The art work to be used for the insertion of the Baskin-Robbins ad onto the national score sheet.

Q And when you printed the score sheet did you have on it an advertisement or the art work from Baskin-Robbins?

A Yes, I did.

Q I show you Plaintiff's Exhibit 36 in evidence and ask you or bring to your attention the right-hand corner thereof. Is this the art work that you received from Baskin-Robbins?

A It is.

Q And subsequent to the shipping and the placing of the score sheets in the various centers did you receive

further communication from Baskin-Robbins?

A Yes, I did.

Q I show you Plaintiff's Exhibit 93 and ask you if in fact this is the communication that you received.

A Yes.

Q And could you tell me when, in what point of time did you receive this particular documentation -- when you received this particular letter?

A Some time after May 16th, May 17th, May 18th.

MR. BRASHICH: At this present time I offer into evidence Plaintiff's Exhibit 93.

MR. NEWMAN: Your Honor, this I have to object to. It purports to state certain facts that I think there cannot be a foundation laid. I did not object to the prior Baskin-Robbins letter. It was a confirmation of an agreement and I think it is proper that we have it in evidence. This has no evidentiary value and I would like to show it to your Honor (handing).

THE COURT: Let me see the prior letter.

MR. BRASHICH: Yes, your Honor(handing).

THE COURT: I will allow it.

MR. NEWMAN: Your Honor, I don't believe that any proper foundation has been laid.

THE COURT: I think the prior piece of paper is a

pretty good foundation, and there was no objection to that.

I take it you received that letter in the ordinary course of the mail, the last one we are talking about?

THE WITNESS: Yes.

THE COURT: I will allow it.

xx (Plaintiff's Exhibit 93 received in evidence.)

MR. DRASHICH: May I read that to the jury, your Honor?

THE COURT: Yes.

(Counsel reads Plaintiff's Exhibit 93 in evidence to the jury.)

Q Did you receive any money from Baskin-Robbins, Mr. Kock?

A No, I did not.

Q Did you send Baskin-Robbins any clarification?

A No, I did not.

Q Now, Mr. Kock, you had testified earlier that you had received $1,000 from Chelsea Milling Company; is that not a fact, sir?

A Yes, it is.

Q I show you Plaintiff's Exhibit 81 and ask you whether you have seen this particular letter.

A Yes, I have.

Q And is that the commitment letter from Chelsea Milling Company for Jiffy?

A Yes, it is.

MR. BRASHICH: I will offer this into evidence as Plaintiff's Exhibit 81.

MR. NEWMAN: No objection.

xx (Plaintiff's Exhibit 81 is received in evidence.)

Q Except for the $1,000 that you received from Chelsea Milling Company, did you receive any additional payment from them?

A No, I did not.

Q Now, sir, in the regular course of your business did you maintain a cash book?

A Yes, I did.

Q And I show you this particular book. Is that the cash book that you maintained?

A Yes, it is.

Q From August 10, 1970, through May 2, 1972, did you have an answering service?

A Yes, I did.

Q And where was this answering service located, Mr. Kock?

A New York City.

Q Excuse me?

A New York City.

Q At what particular address?

A I believe it was on Seventh Avenue. I don't know their exact address. They hooked up to my phone.

Q Winston Kock or Winston Kock and Associates had an address, did it not?

A Yes, it did.

Q What was the address it had or you had?

A 220 East 73rd.

Q Is that your residence address?

A Yes, it is.

Q Did you run your business from that particular residence address?

A Yes, I did.

Q Did you have a telephone at that particular residence address?

A Yes, I did.

Q And did that telephone have an answering device at that particular time, August 10, 1972, through May 2, 1973?

A Yes.

Q And did you pay for this answering service?

A Yes, I did.

Q Do you know how much money you paid from

August 10, 1972, through May 2, 1973? Do you know that independently?

A No.

Q Do you have any records which would help you refresh your recollection?

A Yes.

Q Is that the cash book?

A It would be the cash book, yes.

Q Would you look andread the cash book to yourself.

THE COURT: Didn't we agree he could just give us these figures from there, so we can shortcut this?

MR. BRASHICH: Yes.

MR. NEWMAN: I did agree.

THE COURT: Let's go on.

Q Looking at your cash book, how much money did you spend for the answering service from August 10,1972, through May 2, 1973?

A $129.50.

Q Would you double check those figures, Mr. Kock.

THE COURT: And if they check out we all want to know which answering service that is.

A From August to May how much did I spend? It wasn't very expensive. My answering service was $129.50. That's what it looks like.

Q How much did you pay?

A $21.50 a month.

THE COURT: It sounds right.

Q And was that answering service the advertiser's telephone service of 450 Seventh Avenue?

A Yes, it was.

Q I show you these invoices and these cancelled checks and ask you whether in fact that represents the sum that you paid the answering service?

A Yes, it does.

Q Now, you had a telephone at that particular address, did you not, sir?

A Yes.

Q And you used that telephone for your business?

A Yes, I did.

Q And could you tell us how much you spent for telephone for the period August 10, 1972, to May 2, 1973?

A Approximately $1,760.

Q And I show you these invoices and these cancelled checks and ask you if those represent payment to the Telephone Company?

A Yes, they do.

Q Now, sir, there is an entry in your cash book,

is there not of rental cars?

A Yes, there is.

Q Could you tell us what you spent for car rentals for the period August 10, 1972, through May 2, 1973?

A $979 approximately.

Q Whom did you use for rental of cars, sir?

A I leased a car from Olin's Rent a Car.

Q I show you these cancelled checks and ask you if that represents payment of your car rentals?

A Yes, it does.

Q Now, did you spend and expend any money for postage during this period of time?

A Yes, I did.

Q And by looking at your cash book can you tell us how much you spent for postage for the period August 10, 1972, through May 2, 1973?

A Approximately $281.

Q I show you stamped receipts from the Post Office Department, and are these the receipts for the cash that you paid to the Post Office Department in that period of time?

A Yes, they are.

Q Now, sir, you traveled to various potential advertisers, did you not?

A Yes, I did.

Q And looking at your book could you tell the court and the jury how much you incurred in costs for traveling?

A For the time period only of August to --

Q August 10,1972, to May 2, 1973.

A Approximately $919.

Q And I show you vouchers, tickets and the like and ask you if this in fact represents the money that you had expended for travel?

A Yes, it does.

Q Now, is there an entry in your cash book relative to printing?

A Yes, there is.

Q Now, that entry, does it contain additional suppliers besides the Lasky Company, about which was testified to this morning?

A Yes, it does.

Q From August, 1972, through May 2nd of 1973 what money did you spend on printing?

A Approximately $54,500.

Q And of this sum how much did you pay various printers?

A $48,300, approximately.

Q How much remains owing on your books?

A A little over $6,000.

Q Now, you engaged the services of various photographers, did you not, Mr. Kock?

A Yes.

Q And by photographers, I don't mean people who take pictures, I mean photo supply houses.

A Yes.

Q Is there an entry in your cash book relative to the expenditures that you made in photo supply for developing of photographs?

A Yes, there is.

Q And how much money did you expend between August 10, 1972, and May 2, 1973?

A Approximately $400.

Q And I show you cancelled checks and receipts and ask you to look at them and see whether this represents the amount of payment that you have just testified to.

A Yes, it does.

Q Is there an entry in your cash book, Mr. Kock, relative to entertainment?

A Yes, there is.

Q And could you tell us who in fact you entertained?

A Prospective advertisers, product managers,

advertising agency people, and one or two of the people who lent me -- investors who lent me money.

Q And how much did you expend for that, sir, from August 10, 1972, to May 2, 1973?

A $722.

Q And I show you certain receipts, vouchers, cancelled checks and the like and ask you if these represent the expenditures that you have justtestified to.

A Yes, they do.

Q Now, is there an entry there relative to stationery and supplies?

A Yes, there is.

Q And for the period August 10, 1972, to May 2, 1973, how much did you expend for stationery and supplies?

A Approximately $25[illegible].

Q And I show you these particular vouchers and cancelled checks and ask you if that represents payment for the sum you have just testified to.

A Yes, it does.

Q And you had earlier testified with regard to the sum you had expended for printing. I show you these cancelled checks and vouchers and ask you if this represents the sum that you had expended for printing.

A Yes, it does.

Q Now, you have testified that you had rented a car and used that car for business purposes, have you not?

A Yes, I did.

Q Did you use gasoline?

A Yes.

Q Do you have an entry on your book which shows gasoline, parking and tools?

A Yes, I do.

Q And how much did you spend during the period August 10, 1972, to May 2, 1973, for such charges?

A Approximately $315.16.

Q And I show you these various receipts, stubs and the like and ask you if these are the vouchers representing the sum you have just testified to.

A Yes, they are.

MR. BRASHICH: At this present time collectively plaintiff offers the document, the cash book, into evidence as Plaintiff's Exhibit 35.

(Pause)

MR. NEWMAN: Your Honor, may I suggest that I have an opportunity to review these, say overnight, before the offer is accepted.

THE COURT: Is that agreeable?

MR. BRASHICH: I have no objection.

THE COURT: All right.

MR. BRASHICH: Since we are on that point, may I at this present time offer again into evidence collectively roughly 170 returns from various bowling centers as Exhibit 62. We held this overnight if you recall.

MR. NEWMAN: No objection, your Honor.

THE COURT: All right.

xx 9 (Plaintiff's Exhibit 62 is received in evidence.)

Q Now, looking again at your cash book, all of these items you have testified to, could you give us a sum expended by you with regard to the bowling score sheets for the period August 10, 1972, to May 2, 1973, approximately $63,000.

Q During the time that you were involved with the bowling score sheet enterprize did you receive any communications from other individuals and from other bowling centers which were not Brunswick?

A Yes, I did.

Q And I show you Plaintiff's Exhibits 85 and 87 and ask you whether you have seen these documents prior to today?

A Yes, I have.

Q And was this the communication that you received from other individuals inquiring as to your score sheet?

A Yes, it is.

MR. BRASHICH: I will offer into evidence, your Honor.

MR. NEWMAN: I will object on the grounds of lack of foundation, your Honor.

MR. BRASHICH: I believe that I have laid a foundation, your Honor. Mr. Kock was in business of advertising score sheets.

THE COURT: Let me see those.

MR. BRASHICH: Yes, your Honor (handing).

THE COURT: No, I won't allow them. Objection sustained.

MR. BRASHICH: Thank you, your Honor.

Q Now, Mr. Kock, you did send these score sheets to various Brunswick centers, did you not?

A Yes, I did.

Q And besides the responses which we have already in evidence, did you receive any other letters from the actual center managers?

A Yes, I did.

Q I show you Plaintiff's Exhibit 71 and ask you whether you received this particular document.

A Yes, I did.

(Pause)

MR. NEWMAN: I have no objection.

(Plaintiff's Exhibit 71 is received in evidence.)

MR. BRASHICH: With your leave, your Honor, I would like to read it.

THE COURT: All right.

(Plaintiff reads Plaintiff's Exhibit 71 in evidence to the jury.)

Q Now, sir, subsequent to May 2, 1973, did you receive communication -- withdrawn.

During the period of August, September, October, November and December, 1972; January, February and March, 1973, did you visit potential advertisers?

A Yes, I did.

Q Could you tell us roughly how many potential advertiers you visited?

A Just that period?

Q From August, 1972, through March or April of 1973.

A Can I ask for a rephrasing of the question because advertising agencies and advertisers can be considered to be the same.

Q Well, let me rephrase the question then, Mr. Kock. From the period August, 1972, through April of 1973 could you tell us how many advertisers, manufacturers who would advertise, or advertising agencies, or individuals in the advertising field did youmeet with relative to the

score sheet?

A Easily 100 or over a hundred.

Q And were these in person visits or were these telephone conversations?

A Both.

Q And subsequent to May 2, 1973, did any of those advertisers that you had met correspond with you?

A Yes, they did.

Q I show you Plaintiff's Exhibits 97, 96, 95, 94, 98 and 99, and ask you if these are the responses that you received, sir.

A Yes, they are.

Q And, sir, were these, if you will look at them, were these directed to the address that you maintained an office in?

A Yes, they were.

Q Was this the address that you conducted your business of Winstock Kock or Winston Kock Associates from?

A Yes, it was.

MR. BRACHICH: Plaintiff offers Exhibits 94, 95, 96, 97, 98 and 99 in evidence.

(Pause)

MR. NEWMAN: I object to these on the grounds of lack of foundation.

THE COURT: May I see them?

MR. NEWMAN: Yes, your Honor (handing).

(Pause)

THE COURT: What do you mean by lack of foundation, Mr. Newman?

MR. NEWMAN: Your Honor, again these are letters on letterheads. The individuals who purport to sign them have not in any way been identified nor has there been any testimony with respect to who they are. I think the best evidence would be for these individuals to appear here. There are six letters.

THE COURT: Sustained.

Q Mr. kock, did you ever travel to Hartford, Connecticut, in order to see a potential advertiser?

A On numerous occasions, yes.

Q Did you ever go to Travelers Insurance Company--

MR. NEWMAN: I think what these questions are designed to do is to admit through the questions what your Honor has excluded through the evidence itself.

THE COURT: I think Mr. Brashich is trying to lay the foundation which you said is missing.

MR. NEWMAN: The thing, the only foundation he could lay would be to have the individuals here and testify or have Mr. Kock testify that he knows the signature, he

has seen the signature and he is familiar with it and he can testify to that familiarity.

THE COURT: There may be other ways to do it. Let's hear how Mr. Brashich makes out.

Q Do you recall when you traveled to Hartford, Connecticut?

A Summer of 1972, fall of 1972 and January of 1973.

Q And those particular trips that you took to Hartford, Connecticut, are any expenses and vouchers that you incurred on your trip to Hartford, Connecticut, are they contained in Plaintiff's Exhibit 53 for identification?

A Yes, they are.

THE COURT: Mr. Brashich, that's a long way home. Does Mr. Kock know with whom he spoke at Travelers?

Q Whom did you speak with at Travelers?

A Mr. Donald Kluff, second vice president, advertising and marketing.

Q How much times did you meet him, Mr. Kock?

A Six or seven times easily.

Q Did he ever write to you?

A Yes, he did.

Q I show you Plaintiff's Exhibit 98 and ask you whether this is the letter that you received from him?

A Yes, it is.

MR. BRASH: I will offer that in evidence as Plaintiff's Exhibit 98.

MR. NEWMAN: I still maintain my objection. I think it has not been overcome.

THE COURT: I think it has. Overruled.

MR. NEWMAN: The individual is not here to testify nor is there an identification of signatures.

THE COURT: I am aware of that too. I don't think there is only one way in this context to lay a foundation.

MR. NEWMAN: I assume the testimony would be the same to the balance of the letters?

MR. BRASHICH: Yes.

MR. NEWMAN: If it will be I see no point in going through the same thing.

THE COURT: That makes sense.

(Plaintiff's Exhibits 94 through 99 received in evidence.)

xx

Q Mr. Kock, did you at any time subsequent to the meeting that you had with Mr. Kratzenberg in June of 1972 sit down and estimate the costs of producing the score sheets?

A Yes, I did.

Q And did you at any time subsequent to that date estimate the possible revenue that you would derive from

this particular enterprise?

A Yes, I did.

Q And did you make any memoranda, any notation, any schedule, whatever you like, during that particular period of time?

A Yes, I did.

Q Could you tell us when, approximately, you did that?

A It would have been January or February of 1973.

Q And do you recall what you projected as an overall gross revenue for one year from your score sheets?

MR. NEWMAN: Your Honor, I object to such testimony.

THE COURT: Sustained.

Why don't you take about ten minutes, ladies and gentlemen.

(Jury excused)

(At the side bar)

THE COURT: Now, I am going to give you some modest latitude but there is no use in my letting you build grossly reversible error into your record in case you should accidentally win, and you just can't do that. If that is the best you are going to have now that Walt Peabody is out of the case, I now understand better what you meant when you

said you were abandoning this theory. If that is indeed the best you have, you had better abandon the theory because there is no precedent anywhere that is going to allow a plaintiff to rear back and say what he wrote on the tablecloth in the delicatessen as the measure of damages.

MR. PRASHICH: That's what I had meant, your Honor.

THE COURT: Then all my talk about alternative theories is out the window.

I am slow on the uptake, but you can't project and estimate like that.

MR. PRASHICH: That's why I had said, your Honor, that I didn't know if you would let it go to the jury.

THE COURT: I misunderstood you. In that event, I think you are limited to your out-of-pocket things and some claim for the investment of talents, energies, effort-- I don't know you measure that but you go ahead and whatever is within the realm of reasonableness I will allow the jury to consider and leave it as a matter of factual argument between the two of you. But I take it now we have arrived at the point where when the jury comes back I should tell them that all my talk about alternatives is in fact not in the case and that there will be in fact a single theory of damages.

MR. PRASHICH: Yes, your Honor.

THE COURT: Let me also say, though I am not going to push this at this moment, that that might be a basis on which you gentlemen would want to talk overnight except that I guess you have talked overnight before today.

MR. BRASHICH: Yes, sir.

THE COURT: All right. Then I don't push that. Take another five minutes and we will resume.

One other thing, Mr. Brashich. I still want you to give me your proposed charges on damages and I want you to document it with the numbers and where it derives from in the evidence. Indeed it will probably help Mr. Newman and certainly will help me if you will cite exhibit numbers or whose testimony. I guess the testimony is enough. It is Mr. Kock's testimony.

MR. BRASHICH: The only exhibits that really show any figures is Exhibit 56 which I think Mr. Newman is going to look at overnight which is comprised of the vouchers which are reflected in the cash book. I thought of offering the cash book then there would have been the problem of taping all over the place.

THE COURT: That's not necessary. Mr. Newman graciously consented to the testimony, as I don't think he had to do, and I do mean that I think it was gracious.

MR. NEWMAN: I thought it would help the trial

along, your Honor.

THE COURT: It did help. Then you document it in whatever way will guide me to instructing the jury on this subject.

Five more minutes, gentlemen.

(Recess)

(In open court.)

THE COURT: Is there going to be evidence or has there been and have I missed about whether this money Mr. Kock said he received from several advertisers was ever given back?

MR. BRASHICH: No, sir. If the court will notice from the complaint we are asking for a judgment since the statute has not run indemnifying Mr. Kock from any suits by the advertisers.

THE COURT: What do you mean indemnifying him? Why doesn't he give them the money back?

MR. BRASHICH: He doesn't have it, your Honor. He has spent it on the printing.

MR. NEWMAN: Your Honor, no one has asked for their money back.

MR. BRASHICH: Not to this date. Mr. Kock has been keeping a very low profile.

MR. NEWMAN: The only ones who objected would be

the only one who didn't pay anything, Baskin-Robbins.

THE COURT: What do we do about that? Is that a source of remission for you? I don't think so.

MR. NEWMAN: I would think whatever expenditures he had with the receipts that he also has, yes. I think he is talking about his net losses.

THE COURT: Well, is it fair and reasonable, whether or not it is legal, to agree that if you give him an indemnity of the kind he has asked for, to the extent of any such indemnity verdict returned in the plaintiff's favor will be reduced? Because I don't think it is fair to let him collect from you -- I don't know what those sums total, but let's say 40,000 --

MR. BRASHICH: $41,000.

THE COURT: I don't think it is fair for him to collect that $41,000 from you having already collected it from advertisers.

On the other hand, I don't think it is fair to let the jury deduct that from a verdict without any indemnity and then have him walk out of here and tomorrow morning get sued by Carter Wallace. Indeed I would think the fair and reasonable thing for him to do would be to pay them back out of any verdict but nobody came and asked me about that.

Now, I really think you ought to talk about it because if the record is left in this condition, I am going to have to make some rough adjustment for it. I don't know of any case that tell me how to do it but I will simply try to be fair. I have offhandedly made a suggestion to you that I wish you would think about. I repeat it, that you give Mr. Kock a conditional indemnity; that is to say, conditioned on 1, his recovering a verdict; and 2, it's being a verdict in an amount larger than the $41,000, and it's becoming a final judgment in such a larger amount; and on the third condition that any such verdict will automatically be reduced in the amount of that indemnity. Unless you all agree together, as I think perhaps you should, that you will immediately turn around and give that money to these various advertisers.

I have drafted that on horseback and I think you all can do better. I don't know any way I can make you do this, but then if you don't do it I must try to formulate the legal situation for the jury in such fair way as I can in light of these peculiar circumstances.

MR. NEWMAN: Of course I know your Honor is talking about this in a problematical sense, since we are only partway through the plaintiff's case.

THE COURT: Yes.

MR. NEWMAN: That should there be a verdict.

THE COURT: This is all based on that but I have to be thinking along, and I put that in as the first condition, yes? But I have to be thinking along about these matters as the trial proceeds because all of a sudden you both rest and I want to charge the jury. So that really is all that I have in mind. Sure, you don't have to give him anything if he loses the case, but I have to deal with that $41,000 in some way if and when I come to charge the jury. I either have to tell them to disregard it or tell them to deal with it in some fashion or other that I haven't thought about.

MR. NEWMAN: I would like the opportunity to review it, of course.

THE COURT: Pardon?

MR. NEWMAN: Your Honor is giving me the opportunity to review it and I will.

THE COURT: I would like you both to review it. I don't know that anybody has embraced this subject in the requests to charge. One of the reasons we ask you for requests to charge in advance is so that we can do what I am trying to do now, sort of think about the case as it goes along. One of the reasons I am doing this off the cuff, proposing to you, is that so far as I know there isn't a

word in the requests on either side that takes account of this sum which is slightly larger than my annual salary, so I don't feel I should completely disregard it on a weekday.

Okay.

(Jury present)

THE COURT: While Mr. Kock is making his way to the stand, ladies and gentlemen, I think the situation as of this moment is that that alternative situation with respect to damages may turn out not to be in the case at all. I will keep you posted as we go along on how it looks to me from time to time, but eventually I may give you some instructions that you will be able to follow if we are lucky.

All right, Mr. Brashich.

MR. BRASHICH: Plaintiff will rest at this time.

THE COURT: You don't really mean that, you mean you are finished with your client.

MR. BRASHICH: I am finished with Mr. Kock.

THE COURT: Cross-examination, Mr. Newman.

CROSS EXAMINATION

BY MR. NEWMAN:

Q Mr. Kock, prior to the time that you became involved in bowling score sheets had you had any experience in the field of rendering services to bowling proprietors?

A Prior to beginning in bowling advertising?

Q Yes.

A No, I did not.

Q As a matter of fact, had you played at bowling very much?

A Off and on. Not very much.

Q Were you a member of a league?

A At one time I was, yes.

Q And how long ago was that?

A Summer, fall 1963.

Q Was that at a Brunswick center?

A No, it was not.

Q Therefore, you didn't get any animosity toward Brunswick because of some experience at the center?

A I had a very low bowling average.

Q Were you familiar with bowling terminology? Let's talk about January, 1972, the time that you said you first met with Mr. Kratzenberg of Brunswick. For instance, did you know what the bowling season was?

A I knew that certain things such as bowling seasons sometimes were called seasons. I also knew that bowling was bowling.

Q Well, what did you know about bowling seasons? What was the bowling season?

A What was the bowling season? Well, I think -- it would depend on, I guess -- I guess you would refer to leagues as being seasons. Is that what you are looking for?

Q No, I would like to know if you knew the concept of the bowling season, since you were starting to enter into a business to service bowling proprietors, whether you understood some of these concepts? Did you know what bowling season meant?

A Yes.

Q What did it mean to you?

A There were summer league bowling seasons, there were daytime women bowling seasons which took place all year long, therewere fall bowling seasons, there were professional bowling tournament seasons which were telecast January to February, March, April on the wide world of sports, ABC, pro tournament season, a fall season, spring season and a summer tournament season.

Q You thought all of these were seasons?

A Seasons were applied to all of these different terminologies.

Q Did you know whether there was a season of the year in a bowling center when it did more business than in any other season. As to did more league bowlers bowl at

one time of the year, more individual bowlers?

Q Either class.

A Did they have high income periods? Yes, they did.

Q Did you know if that coincided with what is called in the industry as the bowling season?

A I would not accept that there is the bowling season. There were many bowling seasons.

Q When did you gain all of this knowledge?

A From the fall of 1971 on up through 1972.

Q You didn't know that the bowling season, as it is referred to in the trade, refers to the season beginning September of one year and going over to approximately May of the next year, did you?

A That was not my understanding of the word season, that's correct.

You mean the '73-'74 season? You are confusing me.

Q Did these seasons as you have mentioned them, did they have some kind of a number next to them, like a '73-'74 season?

A Yes. There would be a 1973 season, there would be a 1973-74 season with two numbers next to it. A '71-'72 bowling season. Yes, in either case there would be one number or two numbers.

Q What would the 1973 bowling season be in terms of time?

A 1973.

Q The entire year?

A It would be within 1973, yes.

Q Would it be all of 1973?

A It could be.

Q Or would it be part of 1973?

A Could be the summer of 1973. The professional bowling tournament season starts in January, '73, and goes to April, '73. Season '73.

Q I didn't mean to be asking you about professional bowling tournaments. I am talking about the business of the ordinary bowling center dealing with people who come in to bowl, amateur bowlers, people who bowl for recreation. Do you understand that the '73 bowling season began in January and ended in December; is that it?

A It could have related to any one of these or those bowlers.

Q When did the '73-'74 bowling season begin and end?

A '73-'74 by your definition would have begun in September of 1973, with a '73-'74 season.

Q When would it have ended?

A In 1974, March, April.